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THE [redacted]

v.

[redacted]

On Petition for a Writ of [redacted]

[redacted]

[redacted]

[redacted]

Of Counsel:
W. A. [redacted]
M. W. [redacted]
[redacted]
[redacted]

[redacted]

Dated July [redacted]

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In the

Supreme Court of the United States

OCTOBER TERM, 1959

No. 165

THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Petitioners,

v.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

Respondents Missouri-Kansas-Texas Railroad Company and Missouri-Kansas-Texas Railroad Company of Texas file this brief in opposition to the petition for a writ of certiorari, conforming to Rules 24, 39, and 40.

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OPINION BELOW

No opinion was rendered by the District Court. The opinion of the United States Court of Appeals for the Fifth Circuit, rendered April 20, 1959, is reported, *266 F. 2d 335*, and a copy is attached hereto as Appendix A.

JURISDICTION

Petitioners have invoked the jurisdiction of this Court under the provisions of paragraph (1) of Section 1254 of the United States Code, *28 U. S. C. A. Section 1254(1)*.

Respondents invoked the jurisdiction of the District Court under the provisions of paragraph (a) of Section 1331 and Section 1337 of the United States Code, *28 U. S. C. A. Sections 1331(a) and 1337*.

The judgment of the United States Court of Appeals for the Fifth Circuit, sought to be reviewed, was dated and entered on April 20, 1959. A copy thereof is attached hereto as Appendix B.

STATUTES INVOLVED

The statutes quoted in the petition (pages 5-7) are not involved in this case. The applicable statutes are:

Railway Labor Act

Section 2, General Purposes [45 U. S. C. A. Section 151a, page 475];

Section 3 First (h), (i), (m), (o), (p) [45 U. S. C. A. Section 153 First (h), (i), (m), (o), (p), pages 527, 529, 530].

Interstate Commerce Act

Section 1 (4), (6), (9), (10), (11), (18), (20) [49 U. S. C. A. Section 1 (4), (6), (9), (10), (11), (18), (20), pages 19, 20, 22, 26, 27];

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Section 14 (1) [49 U. S. C. A. Section 14 (1), page 610];

Section 15 (8), (9) [49 U. S. C. A. Section 15 (8), (9), pages 623-624];

Section 16 (1), (2), (7), (8), (9), (10), (12) [49 U. S. C. A. Section 16 (1), (2), (7), (8), (9), (10), (12), pages 8-9, 11, 12];

Section 20 (9), (11), (12) [49 U. S. C. A. Section 20 (9), (11), (12), pages 96, 97, 99].

The pertinent text of these statutes is set forth in Appendix C.

QUESTIONS PRESENTED

Petitioners' statement and questions (pages 2-5) do not accurately disclose the questions presented for review (1) because such statement and questions are predicated upon

assumed agreement violations by respondents, which are the precise questions to be decided by the National Railroad Adjustment Board on submission by respondents now pending before that Board; (2) because such statement and questions omit relevant facts; (3) because such statement and questions contain many inaccuracies and erroneous inferences; and (4) because such statement and questions distort the issues and do not reflect the true nature of this case. For these reasons, respondents make their own statement and set forth the questions presented for review.

By order dated December 18, 1958, the District Court granted respondents a preliminary injunction enjoining a strike by petitioners and other defendants, including respondents' engineers, firemen, conductors, brakemen, and switchmen, pending decisions by the National Railroad Adjustment Board, by the National Mediation Board, and by Committees established by agreements which petitioners allege have been violated by respondents, on submissions by respondents as to whether they violated any agreements with petitioners when respondents on October 19, 1958, made certain changes in their assigned way freight service and in their away-from-home terminals for unassigned through freight service between Wichita Falls, Texas, and Forgan, Oklahoma (R. 102-103, 76-78, 84-85, 86-89, 166-427) (Vol. 1, pages 102-103, 76-78, 84-85, 86-89; Vol. 2, pages 1-262).[1] On January 15, 1959, petitioners appealed from such preliminary injunction (R. 149-153) (Vol. 1, pages 149-153).

[1]A copy of the record in the Court of Appeals, in three volumes, was renumbered and certified as a part of the certiorari record. To avoid any error, double citations are shown.

In the same order of December 18, 1958, the District Court issued a preliminary mandatory injunction against respondents, without supporting pleadings and proof and without requiring security from petitioners and other defendants, commanding respondents, pending such decisions by said Boards and Committees, either to restore such way freight service or pay to employees adversely affected by such change in way freight service the same amount of money which such employees would have earned had such changes in way freight service not been made (R. 102-103) (Vol. 1, pages 102-103). On December 29, 1958, respondents appealed from such preliminary mandatory injunction (R. 104-105) (Vol. 1, pages 104-105).

By order entered as of January 5, 1959, the District Court denied respondents' motion for a stay of said preliminary mandatory injunction during the pendency of their appeal and by that order the District Court attempted to convert said preliminary mandatory injunction against respondents into a condition upon which that Court granted said preliminary injunction against petitioners (R. 136-138, 112-114, 115-116) (Vol. 1, pages 136-138, 112-114, 115-116). On January 13, 1959, respondents appealed from such order (R. 140-142) (Vol. 1, pages 140-142).

By order entered January 6, 1959, the Court of Appeals stayed enforcement of that part of said order of December 18, 1958, from which respondents appealed, pending disposition of said appeal and issuance of the mandate of said Court and upon the filing by respondents of a supersedeas bond in the sum of $10,000.00 which was filed, and ap-

proved by a Judge of that Court, on January 6, 1959 (R. 615, 617).

On April 20, 1959, after the filing of briefs, hearing and oral argument, the Court of Appeals entered its judgment reading in part as follows:

> "It is now here ordered and adjudged by this Court that that part of the judgment of the district court of December 18, 1958, requiring the restoration and maintenance of the status quo or the optional alternative payments, in this cause be, and the same is hereby, vacated; and, as thus modified, that judgment be, and it is hereby affirmed" (Appendix B).

And on the same day, the Court of Appeals rendered its opinion in support of its judgment, reading in part as follows:

> "We conclude that the district court had jurisdiction to grant the preliminary injunction against a strike in this labor dispute in order to protect the primary jurisdiction of the National Railroad Adjustment Board to resolve the dispute.
>
> "Turning now to the appeal of the Railroad Companies, we do not find it necessary to decide whether the order of which they complain was a preliminary mandatory injunction against them or simply a condition upon which they were granted a preliminary injunction against the defendants. Whether injunction or condition, the order directed the Railroad Companies to restore and maintain conditions affected by their General Orders 119 and 120 to the conditions which existed prior to the effective date of such orders, or, at the election of the Companies, to pay the employees adversely affected by such orders the same amounts they would have paid such employees had the changes made by such orders not been effected. If we accept the premise, heretofore discussed and decided, that the dispute precipitated by General Orders 119

and 120 was a minor dispute, which the National Railroad Adjustment Board alone had jurisdiction to resolve, then it is clear that the district court could not pass any sort of preliminary judgment upon the merits of that dispute. That kind of jurisdiction denied to the district court by the provisions of the Railway Labor Act cannot be exercised under the guise of discretionary equity powers to impose reasonable conditions upon the grant of an injunction, of requiring the plaintiff Railroad Companies to come into equity with clean hands, or upon any other theory whatsoever. To hold otherwise would permit the district court, in every case where either a railroad company or a labor organization seeks an injunction to protect the jurisdiction of the National Railroad Adjustment Board, to lift itself by its bootstraps into some kind of jurisdiction to pass preliminary judgment upon the merits of disputes committed to the exclusive jurisdiction of the Board" (R. 624, Appendix A, pages 10-11; *266 F. 2d 335, 340-341).*

The questions presented for review by the petition for a writ of certiorari[2] are:

Question 1

Did the Court of Appeals correctly hold that the District Court had jurisdiction and properly enjoined the strike to protect the primary jurisdiction of the National Railroad Adjustment Board to render its decision on petitioners' claims of agreement violations by respondents?

Question 2

Did the Court of Appeals correctly hold that petitioners' claims of agreement violations by respondents were "minor" disputes to be resolved by the National Railroad Adjustment Board?

Footnote 2 on next page.

Question 3

Did the Court of Appeals correctly hold that the preliminary injunction against petitioners was not prohibited by the Norris-LaGuardia Act?

Question 4

Did the Court of Appeals correctly hold that the District Court lacked jurisdiction and was without authority, either by preliminary mandatory injunction against respondents

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[2]Other questions in the case, not presented by petitioners, are:

(a) Was the preliminary mandatory injunction against respondents or the condition attached to the preliminary injunction against petitioners an invasion by the District Court of any jurisdiction of the National Mediation Board?

(b) Was the preliminary mandatory injunction against respondents or the condition attached to the preliminary injunction against petitioners an invasion by the District Court of any jurisdiction of the Committees created by agreements which petitioners claim were violated by respondents?

(c) Assuming that the District Court had jurisdiction and possessed discretion to issue the preliminary mandatory injunction against respondents or to attach the condition to the preliminary injunction against petitioners, which respondents deny, was the issuance of said preliminary mandatory injunction or the attaching of said condition an abuse of discretion by the District Court and was such preliminary mandatory injunction against respondents or such condition attached to said preliminary injunction against petitioners void and unenforceable for each and all of the following reasons:

(1) Because there are no pleadings or evidence to support said preliminary mandatory injunction or condition;

(2) Because the District Court did not require security from petitioners as required by Rule 65(c) of the Federal Rules of Civil Procedure;

(3) Because enforcement of said preliminary mandatory injunction or condition would destroy the status quo at the time the preliminary injunction was issued against petitioners;

(4) Because enforcement of said preliminary mandatory injunction or condition would restore and preserve the status quo which existed before respondents made service changes pursuant to their General Orders 119 and 120 and before the strike which made this litigation necessary; and

(5) Because said preliminary mandatory injunction or condition constitutes an adjudication of the merits of this controversy on respondents' application for a preliminary injunction?

(d) Did the District Court have jurisdiction and power, by its order entered as of January 5, 1959, to convert its preliminary mandatory injunction against respondents, from which respondents appealed on December 29, 1958, into a condition attached to its preliminary injunction against petitioners?

or by condition attached to the preliminary injunction against petitioners, to pass preliminary judgment upon the merits of the disputes by ordering respondents, pending decision by the National Railroad Adjustment Board on petitioners' claims of agreement violations by respondents, either to restore and maintain conditions affected by respondents' General Orders 119 and 120 to the conditions which existed prior to the effective date of such orders or, at the election of respondents, to pay to the employees adversely affected by such orders the same amounts they would have paid such employees had the changes made by such orders not been effected?

Question 5

Was the preliminary mandatory injunction against respondents or the condition attached to the preliminary injunction against petitioners an invasion by the District Court of the exclusive primary jurisdiction of the National Railroad Adjustment Board to determine whether respondents violated any agreements with petitioners and to determine what sum of money, if any, respondents should pay to their employees?

STATEMENT OF THE CASE

The controlling facts are summarized to place this case in proper focus.

Controlling Facts

Without warning, respondents' engineers, firemen, conductors, brakemen and switchmen struck at 6:00 o'clock

A. M. on November 6, 1958. This strike paralyzed all train operations of respondents over 2919 miles of track extending from St. Louis and Kansas City to Oklahoma City, Houston, and San Antonio; it completely paralyzed all yard operations of respondents and all of their switching service to industries at and between those points; it stopped the rail transportation by respondents of United States mail; it stopped the transportation by respondents of passengers and freight in interstate commerce and in intrastate commerce; it stopped switching service by respondents to more than 3600 industries which are served exclusively by them; it stopped switching service by respondents to more than 1300 industries which are served by respondents and other railroads; it stopped switching service by respondents to hundreds of team tracks and freight stations serving thousands of industries; and it stopped the interchange of cars between respondents and many other railroad companies at hundreds of interchange points (R. 74-75, 90, 16, 18-20) (Affidavit of A. F. Winkel, and Map Exhibit No. 1, Vol. 1, pages 74-75, 90; Verified Complaint, Vol. 1, pages 16, 18-20). (Affidavit and testimony of A. F. Winkel offered, R. 475, 479, 521-522; Vol. 3, pages 47, 51, 93-94.)

The strike was stopped by a temporary restraining order followed by a preliminary injunction (R. 23-28, 82, 102-103) (Vol. 1, pages 23-28, 82, 102-103).

If the strike is resumed, the above described operations of respondents will again be stopped; respondents will be compelled to close more than 500 stations now serving cities, towns and communities in the States of

Missouri, Kansas, Oklahoma, and Texas; respondents will be prevented from transporting more than 900 cars and 37,000 tons of freight daily; respondents will be compelled to lay off approximately 2100 employees,[3] with average daily earnings totaling $33,600.00, in addition to approximately 1100 employees out on strike; and respondents will be immediately deprived of revenues in excess of $160,000.00 per day which will jeopardize the ability of respondents to meet their mortgage and equipment obligations approximating $10,000.00 per day (R. 75, 18-20) (Affidavit of A. F. Winkel, Vol. 1, page 75; Verified Complaint, Vol. 1, pages 18-20).

Approximately 83% of the gross revenues of respondents are derived from the transportation of United States mail, express, passengers and freight in interstate commerce to, from, and between the States of Missouri, Kansas, Oklahoma, and Texas, and between those States and practically every other State in the United States, and a resumption of said strike would prevent respondents from transporting such interstate commerce as well as intrastate commerce within the States of Missouri, Kansas, Oklahoma, and Texas (R. 76, 20) (Affidavit of A. F. Winkel, Vol. 1 page 76; Verified Complaint, Vol. 1, page 20).

Petitioners claim that this strike was called because respondents violated certain agreements with petitioners when respondents made certain changes in their assigned way freight service and in their away-from-home terminals

[3]In contrast, 10 employees of respondents were affected by the operating changes which preceded the strike (R. 507) (Vol. 3, page 79).

for unassigned through freight service between Wichita Falls, Texas, and Forgan, Oklahoma. Prior to the hearing on respondents' application for a preliminary injunction, these claims of petitioners were submitted by respondents to the First Division of the National Railroad Adjustment Board and, subject to jurisdictional objections, in part to the National Mediation Board[4] and Committees established by some of the agreements which petitioners claim have been violated by respondents (R. 76-78, 84-85, 86-89, 166-427) (Vol. 1, pages 76-78, 84-85, 86-89; Vol. 2, pages 1-262).

Facts Relating to Merits

Respondents believe that the foregoing facts are determinative of this petition for a writ of certiorari and that it was both unnecessary and improper for petitioners to burden the Court with an array of facts relating solely to the merits of the controversy to be decided by the First Division of the National Railroad Adjustment Board. However, since petitioners have indulged in such facts, it is necessary for respondents to do likewise in order that they may refute petitioners' arguments, correct misstatements

[4]In two letters dated January 30, 1959, the National Mediation Board advised respondents as follows:

> "Your application was considered by the Board in executive session on January 26, 1959. In view of the fact that the carriers named have submitted this dispute both to the First Division of the National Railroad Adjustment Board and the Disputes Committees created by the articles of the national agreements mentioned above, the Board directed that your application for an interpretation of the national agreements in question be declined on the basis of the carriers having taken this dispute to the tribunals of appropriate jurisdiction created by Section 3 of the Railway Labor Act and the appropriate sections of the national agreements just mentioned."

Copies of these letters are attached as Appendix D and Appendix E to this brief.

and erroneous inferences of petitioners, supply omissions, and give the Court a true picture of the underlying controversy.

The lines of railroad involved in this litigation are shown in red on the map, marked "Exhibit 1", attached to and made a part of the affidavit of A. F. Winkel (R. 90) (Vol. 1, page 90). The portion thereof between Wichita Falls, Texas (North Yard), and Forgan, Oklahoma, over which this controversy arose, is emphasized by paralleling green lines. This line, 302 miles in length, is the Western Subdivision of the Southern Division of respondents' lines of railroad (R. 76) (Vol. 1, page 76).

This 302-mile line now constitutes and always has constituted a separate seniority district for respondents' engineers, firemen, conductors and brakemen, and each of such employees holding seniority on such district now has and always has had the right to exercise such seniority anywhere on such district and to perform any needed service over all or any part of said district to which he is or was entitled by virtue of such seniority (R. 76) (Vol. 1, page 76).

Rearrangement of Service

Prior to October 19, 1958, way freight crews on this line were assigned as follows:

> Two crews between North Yard (Wichita Falls, Texas) and Welon (Altus, Oklahoma), a distance of 75.9 miles, daily except Sunday, with North Yard the home terminal for both crews, and with Sunday layover at North Yard for one crew and at Welon for the other crew;

One crew from Welon (Altus, Oklahoma) to Elk City, Oklahoma, and return, a distance of 58.3 miles in each direction, daily except Saturday, with Welon the home terminal and with Saturday layover at Welon;

One crew from Elk City, Oklahoma, to Guest (Woodward, Oklahoma), a distance of 84.8 miles, on Mondays, Wednesdays and Fridays, and from Guest to Elk City on Tuesdays, Thursdays and Saturdays, with Elk City the home terminal and with Sunday layover at Elk City; and

One crew from Guest (Woodward, Oklahoma) to Forgan, Oklahoma, a distance of 83.2 miles, on Mondays, Wednesdays and Fridays, and from Forgan to Guest on Tuesdays, Thursdays and Saturdays, with Guest the home terminal and with Sunday layover at Guest.

Such way freight assignments, or similar way freight assignments between North Yard (Wichita Falls, Texas) and Forgan, Oklahoma, have been in existence for more than twenty-five years (R. 76-77) (Vol. 1, pages 76-77).

Effective at 12:01 A. M. on October 19, 1958, respondents rearranged assigned way freight service between North Yard (Wichita Falls, Texas) and Forgan, Oklahoma, as follows:

Assigned two wayfreight crews to operate between North Yard (Wichita Falls, Texas) and Elk City, Oklahoma, a distance of 134.2 miles, daily except Sunday, with North Yard the home terminal of both crews, and with Sunday layover at North Yard for one crew and at Elk City for the other; and

Assigned one wayfreight crew to operate from Elk City, Oklahoma to Forgan, Oklahoma, a distance of 168 miles, on Mondays, Wednesdays and Fridays, and from Forgan to Elk City on Tuesdays, Thursdays and Saturdays, with Elk City the home terminal and with Sunday layover at Elk City.

This rearrangement of way freight service was made in accordance with General Order No. 119 of respondents dated October 2, 1958, a copy of which, marked "Exhibit 2", is attached to and made a part of the affidavit of A. F. Winkel (R. 91) (Vol. 1, page 91).

Prior to October 19, 1958, North Yard (Wichita Falls, Texas) was the home terminal and Altus, Oklahoma, Woodward, Oklahoma, and Forgan, Oklahoma, were the bulletined away-from-home terminals for unassigned crews in through freight service between North Yard (Wichita Falls, Texas) and Forgan, Oklahoma. Effective at 12:01 A. M. on October 19, 1958, respondents abolished Altus, Oklahoma, and Woodward, Oklahoma, as away-from-home terminals for unassigned crews in through freight service, established Elk City, Oklahoma, as an away-from-home terminal for such crews, leaving North Yard (Wichita Falls, Texas) as the home terminal and Forgan, Oklahoma, as an away-from-home terminal for such crews. This change in away-from-home terminals was made in accordance with General Order No. 120 of respondents dated October 2, 1958, a copy of which, marked "Exhibit 3", is attached to and made a part of the affidavit of A. F. Winkel (R. 77-78, 92) (Vol. 1, pages 77-78, 92).

North Yard (Wichita Falls, Texas) now is and always has been the home terminal for unassigned crews in through freight service between North Yard and Forgan, Oklahoma, and North Yard (Wichita Falls, Texas) now is and always has been the only point where an extra board has been maintained for way freight crews and unassigned

through freight crews operating between North Yard (Wichita Falls, Texas) and Forgan, Oklahoma (R. 78) (Vol. 1, page 78).

Assigned way freight crews now handle, and they always have handled, all of the traffic between North Yard (Wichita Falls, Texas) and Forgan, Oklahoma, except, during the grain seasons in May and June of each year, unassigned crews in through freight service are called as needed to handle the overflow wheat which cannot be handled by way freight crews, and, when so called, unassigned through freight crews operate over all or any portion of the line without changing crews except in rare instances where an available crew is used out of any away-from-home terminal under the first-in first-out rule (R. 78) (Vol. 1, page 78).

This line has been recently dieselized. Prior thereto all traffic was handled by steam locomotives which were capable of only short runs, making it necessary to have more terminals. This resulted in considerable terminal delays to through traffic because the requirements of local service made it impossible to arrange through connecting schedules. These delays resulted in the loss of traffic, principally through diversion to trucks. To overcome such losses, it was necessary to expedite the movement of traffic by extending runs and reducing the number of terminals, thereby eliminating all unnecessary terminal delays. This was made possible through the use of diesel power. These were the changes made effective on October 19, 1958 (R. 78) (Vol. 1, page 78).

Agreement Provisions

There is no provision in any agreement between respondents and petitioners, or any of them, which prohibited respondents from making such changes. On the contrary, such changes were authorized by the following provisions of agreements between respondents and petitioners, viz:

Agreement with
The Brotherhood of Locomotive Engineers
(Effective October 1, 1918)

"Article 34"

"The rights to regular engines, also the right and preference to regular runs will be governed by seniority in service on the respective districts to which engineers may be assigned.

"No freight run or yard engine of less than six days per week will be considered for regular assignment and engineers on all such assignments will be paid for all work days not used. *Five days' notice will be given before* road service of this kind is inaugurated or *terminal is changed.* It is understood that fixture switch engineers hold seniority only in yard service." (Agreement page 29.) (Our italics.) (R. 78-79.) (Vol. 1, pages 78-79.)

"Article 35"

"Should service be reduced, preference of runs will be governed by seniority on the respective district; when any run is created or vacant on district, the senior engineer on such district will have the right to such run. Should he decline to accept it, or fail to ask for it within ten days, after such vacancy occurs, he will forfeit his right to such run until it again becomes vacant, and it will be open to each engineer who is younger in service in accordance with above provisions.

"*A run will be vacant when terminal is changed to the extent of two miles or more* or when vacated by the

engineer holding it, or when the regular time or mileage is changed as much as four hours." (Agreement page 30.) (Our italics.) (R. 79.) (Vol. 1, page 79.)

"Article 11"

"Held Away-From-Home Terminal"
(As amended by National Agreement dated August 11, 1948—page 15)

"(a) Engineers in pool freight and in unassigned service held at other than home terminal will be paid continuous time for all time so held after the expiration of sixteen hours from the time relieved from previous duty, at the regular rate per hour paid them for the last service performed. If held sixteen hours after the expiration of the first twenty-four hour period, they will be paid continuous time for the time so held during the next succeeding eight hours, or until the end of the second twenty-four hour period, and similarly for each twenty-four hour period thereafter.

"(b) Should an engineer be called for service or ordered to deadhead after pay begins, the held-away-from-home terminal time shall cease at the time pay begins for such service or, when deadheading, at the time the train leaves the terminal, except that in no event shall there be duplication of payment for deadhead time and held-away-from-home terminal time.

"(c) Payments accruing under this rule shall be paid for separate and apart from pay for the subsequent service or deadheading.

"(d) For the purpose of applying this rule, the *railroad will designate a home terminal* for each crew in pool freight and in unassigned service." (Our italics.) (R. 79.) (Vol. 1, page 79.)

Agreement with
The Brotherhood of Locomotive Firemen and Enginemen (Effective October 1, 1918, with revisions to November 1, 1957)

"Article 40"

"(a) When any run is created or vacant on a district, the senior fireman on such District will have the right to such run. Should he fail to make application or bid for such run within five days after such vacancy is posted, except in the case of sickness or absence, he will forfeit his right to such run until it again becomes vacant, and it will be opened to each fireman who is younger in service in accordance with the above provisions, provided, that when a fireman exercises the privilege of taking a run created or made vacant during his sickness or absence, the run will not otherwise be reopened.

"(b) *A run will be considered vacant when terminal is changed to the extent of two or more miles*, or when vacated by the firemen holding it, or when the time or mileage is changed to the extent of 10 per cent, or when the lay over is changed as much as four hours. This last provision not to apply to yard engines." (Agreement page 40.) (Our italics.) (R. 79-80.) (Vol. 1, pages 79-80.)

"Article 11"

"Held Away From Home Terminal"

"(a) (National Agreement, August 11, 1948) Firemen, and helpers on other than steam power, in pool freight and in unassigned service held at other than home terminal will be paid continuous time for all time so held after the expiration of sixteen hours from the time relieved from previous duty, at the regular rate per hour paid them for the last service performed. If held sixteen hours after the expiration of the first twenty-four hour period, they will be paid continuous time for the time so held during the next succeeding eight hours, or until the end of the second twenty-four hour period, and similarly for each twenty-four hour period thereafter.

"(b) Should firemen, or helper on other than steam power, be called for service or ordered to deadhead

after pay begins, the held-away-from-home terminal time shall cease at the time pay begins for such service or, when deadheading, at the time the train leaves the terminal except that in no event shall there be duplication of payment for deadhead time and held-away-from-home terminal time.

"(c) Payments accruing under this rule shall be paid for separate and apart from pay for the subsequent service or deadheading.

"(d) For the purpose of applying this rule, *the railroad will designate a home terminal* for each crew in pool freight and in unassigned service." (Agreement page 17.) (Our italics.) (R. 80.) (Vol. 1, page 80.)

Agreement with
The Brotherhood of Railroad Trainmen and The Order of Railway Conductors and Brakemen (Effective November 1, 1929, with revisions to April 1, 1954)

"Article 10"

"Wayfreight and Mixed Train Service"
"Rates of pay effective December 16, 1953"

* * * * *

"(f) No changes will be made in the above runs (between Wichita Falls and Forgan), nor number of crews assigned to them, unless business or changed conditions justify it, nor will terminals be changed, or runs rearranged, without ten (10) days' notice * * *." (Agreement page 15.) (R. 80.) (Vol. 1, page 80.)

"Article 45"

* * * * *

"(e) Seniority will govern the preference of assignment in service, provided that senior trainmen declining closed runs will forfeit their rights to same

until vacancies occur, except in reducing the force, the youngest man will be reduced from the service.

* * * * *

"(g) Trainmen holding closed runs who are displaced by their seniors or whose runs have been abolished, will have the right within ten (10) days to displace any junior man.

* * * * *

"(i) The following shall be known as closed runs: *Wayfreight and mixed runs*, assigned work trains, pilots assigned to helper engines, also passenger runs that are located away from division terminals, regular runs on the G. H. & H. and any other runs located away from a district terminal, *and shall be advertised for a period of ten (10) days.*" (Agreement page 39.) (Our italics.) (R. 80-81.) (Vol. 1, pages 80-81.)

* * * * *

Freight Service Rulings

(Appendix to Agreements with The Brotherhood of Railroad Trainmen and The Order of Railway Conductors and Brakemen.)

* * * * *

"(h) When closed runs are thrown open for advertisement due to changed conditions etc., the regular conductor and brakeman holding such run at that time will be permitted to hold run during advertisement.

"(i) It is agreed that when a terminal is changed for a closed run or a run changed from day to night, such run will be advertised." (R. 80.) (Vol. 1, page 80.)

"Article 34"

"Conductors and Trainmen in pool freight and in unassigned service held at other than home terminal will be paid on the minute basis for the actual time so held after the expiration of sixteen hours from the

time relieved from previous duty at a rate per hour of ⅛th of the daily rate paid them for the last service performed. If held sixteen hours after the expiration of the first twenty-four hour period from the time relieved, they will be paid for the actual time so held during the next succeeding eight hours, or until the end of the second twenty-four hour period, and similarly for each twenty-four hour period thereafter.

"Should a Conductor or Trainman be called for service or ordered to deadhead after pay begins, held away from home terminal time shall cease at the time pay begins for such service or deadheading.

"Payments accruing under this rule shall be paid for separate and apart from pay for the subsequent service or deadheading.

"For the purpose of applying this rule *the railroad will* designate a home terminal for each crew in pool freight and in unassigned service." (Agreement page 30.) (Our italics.) (R. 81.) (Vol. 1, page 81.)

On October 7, 1958, petitioners requested respondents to cancel said General Order No. 119 and said General Order No. 120 and on the same date respondents denied such request (R. 81) (Vol. 1, page 81).

Proceedings Before
National Mediation Board

On October 14, 1958, the National Mediation Board advised respondents that petitioners had requested the services of the Board "in dispute with MKT Railroad over abolishing established terminals and *changing* intra-divisional *service* contrary to provisions of Article 4 of BLE, BLF&E, and ORC&B May 23, 1952 and Article 6 May 25, 1951 National Agreements" (Our italics) (R.

82) (Vol. 1, page 82). Said alleged agreements are more fully described in paragraphs IX and XII of the complaint, as amended (R. 16-18, 68-70) (Vol. 1, pages 16-18, 68-70), and copies of said alleged agreements with The Order of Railway Conductors, The Brotherhood of Locomotive Engineers, and The Brotherhood of Locomotive Firemen and Enginemen are attached as Exhibits 9, 10, and 11 to respondents' submission to the First Division of the National Railroad Adjustment Board (R. 69, 206-208) (Exhibit A to Amendment and Supplement to Complaint; Vol. 1, page 69; Vol. 2, pages 41-43).

As above shown, in seeking the services of the National Mediation Board, petitioners charged respondents with violating agreements with four organizations, namely, The Brotherhood of Railroad Trainmen, The Order of Railway Conductors and Brakemen (formerly The Order of Railway Conductors), The Brotherhood of Locomotive Engineers, and The Brotherhood of Locomotive Firemen and Enginemen. However, in their verified answer, petitioners admitted that there is no such agreement with The Brotherhood of Railroad Trainmen (R. 15-16, 43) [Verified Complaint, paragraph IX(b); Verified Answer, paragraph 5; Vol. 1, pages 15-16, 43]. And petitioners now rely only on such agreements with The Brotherhood of Locomotive Engineers and The Brotherhood of Locomotive Firemen and Enginemen, thereby in effect admitting that there is no such agreement with The Brotherhood of Railroad Trainmen or The Order of Railway Conductors and Brakemen (Petition, pages 7-9).

On October 20, 1958, the Executive Secretary of the National Mediation Board advised respondents and petitioners that said application of petitioners for the services of the Board had been given the Board's file C-2827 and that one of the Board's mediators then in Dallas, Texas, would commence an investigation on October 21, 1958, and that the Board "suggests carrier defer contemplated changes pending such immediate investigation". At that time, said changes had already been made pursuant to and in accordance with respondents' said General Orders Nos. 119 and 120 which became effective at 12:01 A. M. on October 19, 1958 (R. 82) (Vol. 1, page 82).

On November 5, 1958, after investigation by said mediator, the National Mediation Board advised respondents and petitioners as follows:

> "Re file C-2827 Missouri-Kansas-Texas Railroad and BLE, BLF&E, ORC&B and BRT concerning carrier's action in abolishing terminal and *changing various runs.* On basis of mediator's investigation and in view of fact this dispute appears identical with that covered by our case E-56 handled in 1956, National Mediation Board is of opinion that the dispute is not one subject to docketing and mediation under the Act. All concerned are therefore notified that file C-2827 is being closed as of this date." (Our italics.)

Without notice to respondents, a strike of their engineers, firemen, conductors, brakemen, and switchmen was called by petitioners and became effective at 6:00 o'clock A.M. on November 6, 1958, but was stopped by a temporary restraining order followed by a preliminary injunction (R. 82, 23-28, 102-103) (Vol. 1, pages 82, 23-28, 102-103).

Case E-56, to which the Board referred, originated on August 27, 1956, in a strike called for 12:01 A. M. on September 1, 1956, by The Brotherhood of Railroad Trainmen, The Brotherhood of Locomotive Firemen and Enginemen, and The Order of Railway Conductors and Brakemen. At the request of the Board, and during mediation proceedings, said Brotherhoods and Order agreed to withdraw said strike date and respondents agreed to maintain the status quo. On October 22, 1956, after unsuccessful mediation efforts, the National Mediation Board closed its file in Case E-56 (R. 83) (Vol. 1, page 83).

Said Case E-56 involved the same controversy as that involved in file C-2394 of the National Mediation Board which was commenced on August 11, 1955, when The Brotherhood of Locomotive Engineers, The Brotherhood of Locomotive Firemen and Enginemen, The Brotherhood of Railroad Trainmen, and The Order of Railway Conductors and Brakemen, requested the Board to take jurisdiction. At the request of the Board, respondents deferred the proposed changes. On February 10, 1956, after investigation by a mediator, the National Mediation Board by telegram advised respondents and said Brotherhoods and Order, with respect to the dispute involved in the Board's file C-2394, as follows:

> "Investigation of this file indicates that carrier has complied with Article 10(f) in Conductors and Brakemen's agreement and Article 34 of Engineers agreement by serving notice required under those articles of change in assignment. Investigation further indicates that no formal notices have been served by either party on the other for change in agreement on this

subject. Section 2 Seventh and Section 6 of RLA (Railway Labor Act) apply only in situations where notices of changes are served by either party on the other in rates, rules or working conditions as covered by agreements. In absence of such notices this Board fails to find any basis for docketing application for mediation filed by the four organizations."

And, in response to an inquiry from the President of The Brotherhood of Locomotive Firemen and Enginemen with respect to said advice of February 10, 1956, the National Mediation Board by letter dated February 29, 1956, advised the President of said Brotherhood as follows:

"You state that some question has arisen regarding the authority of this Board to determine whether or not the carrier 'has complied with Article 10(f) of the Conductors' and Brakemen's Agreement and Article 34 of the Engineers' Agreement by serving notice required under those Articles of change in assignment.'

"Our telegram of February 10, 1956 stated only that the Mediator's investigation of this file indicates that the carrier had complied with those articles by the serving of required notices. The question of proper interpretation or application of those articles to the controversy was not touched upon.

"The National Mediation Board has no power under the Railway Labor Act to interpret the provisions of working agreements nor make any determination regarding compliance or non-compliance with such agreements in any particular situation. Such determinations can, of course, be made only by the National Railway Adjustment Board.

"Our telegram was intended to direct attention to the fact that in the absence of notices served by either party on the other for changes in rates, rules or working conditions, no basis exists under Section 2, Seventh, or Section 6 of the Railway Labor Act on

> which the application filed by the three organizations could be docketed. Any questions involving the proper interpretation or application of agreement rules would come under the jurisdiction of the National Railway Adjustment Board."

Neither respondents nor petitioners, or any of them, have served any notice on the other of any intended change in any agreement affecting rates of pay, rules or working conditions (R. 83-84) (Vol. 1, pages 83-84).

REASONS FOR DENYING WRIT

Petitioners' reasons for granting the writ (pages 13-27) are unsound and should be disregarded (1) because they are predicated upon unwarranted claims of statutory violations by respondents, (2) because they are predicated upon assumed agreement violations by respondents which are questions to be decided by the National Railroad Adjustment Board on submission by respondents now pending before that Board, (3) because they omit relevant facts, (4) because they contain inaccuracies and erroneous inferences, and (5) because they distort the issues and do not reflect the true nature of the case.

This cause should not be reviewed by this Court, and the petition for a writ of certiorari should be denied, for each and all of the following reasons:

1. The Court of Appeals correctly held that the District Court had jurisdiction and properly enjoined the strike to protect the primary jurisdiction of the National Railroad Adjustment Board to render its decision on petitioners' claims of agreement violations by respondents.

2. The Court of Appeals correctly held that petitioners' claims of agreement violations by respondents were "minor" disputes to be resolved by the National Railroad Adjustment Board.

3. The Court of Appeals correctly held that the preliminary injunction against petitioners was not prohibited by the Norris-LaGuardia Act.

4. The Court of Appeals correctly held that the District Court lacked jurisdiction and was without authority, either by preliminary mandatory injunction against respondents or by condition attached to the preliminary injunction against petitioners, to pass preliminary judgment upon the merits of the disputes by ordering respondents, pending decision by the National Railroad Adjustment Board on petitioners' claims of agreement violations by respondents, either to restore and maintain conditions affected by respondents' General Orders 119 and 120 to the conditions which existed prior to the effective date of such orders or, at the election of respondents, to pay to the employees adversely affected by such orders the same amounts they would have paid such employees had the changes made by such orders not been effected.

5. The order of the District Court dated December 18, 1958, requiring respondents, pending decision by the National Railroad Adjustment Board on petitioners' claims of agreement violations by respondents, either to restore and maintain conditions affected by respondents' General Orders 119 and 120 to the conditions which existed prior to the effective date of such orders or, at the election of

respondents, to pay to the employees adversely affected by such orders the same amounts they would have paid such employees had the changes made by such orders not been made, was an unlawful invasion by the District Court of the exclusive primary jurisdiction of the National Railroad Adjustment Board. *Order of Railway Conductors v. Pitney, 326 U. S. 561, 90 L. Ed. 318, 66 S. Ct. 322; Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 94 L. Ed. 795, 70 S. Ct. 577; Pennsylvania R. Co. v. Day* (June 29, 1959), *3 L. Ed. 2d 1422.* In the *Slocum* case, this Court declared that the reasoning of its decision in the *Pitney* case "equally supports a denial of power in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act" *(U. S. page 244, L. Ed. page 800).* This sweeping "denial of power" extends to any judgment or any part thereof, including any condition attached thereto, which invades the jurisdiction of the National Railroad Adjustment Board and there is no occasion, therefore, for this Court again to declare the law.

6. The petition for a writ of certiorari is predicated upon assumed agreement violations by respondents, which are questions to be decided by the National Railroad Adjustment Board on respondents' submission now pending before that Board.

7. Respondents have not violated any agreements with petitioners.

8. Respondents have not violated any provision of the Railway Labor Act.

9. The District Court had jurisdiction and properly enjoined the strike pending decision by the National Media-

tion Board on respondents' submissions made subject to jurisdictional objections.

10. The District Court had jurisdiction and properly enjoined the strike pending decisions of Committees created by agreements which petitioners claim were violated by respondents, on respondents' submissions made subject to jurisdictional objections.

11. The District Court lacked jurisdiction and power, by its order entered as of January 5, 1959, to convert its preliminary mandatory injunction against respondents, from which respondents appealed on December 29, 1958, into a condition attached to its preliminary injunction against petitioners.

12. Assuming that the District Court had jurisdiction and possessed discretion to issue said preliminary mandatory injunction against respondents or to attach said condition to the preliminary injunction against petitioners, which respondents deny, the issuance of said preliminary mandatory injunction or the attaching of said condition was an abuse of discretion by the District Court and such preliminary mandatory injunction against respondents or such condition attached to said preliminary injunction against petitioners was void and unenforceable for each and all of the following reasons:

(a) Because there are no pleadings or evidence to support said preliminary mandatory injunction or condition;

(b) Because the District Court did not require security from petitioners as required by Rule 65(c) of the Federal Rules of Civil Procedure;

(c) Because enforcement of said preliminary mandatory injunction or condition would destroy the status quo at the time the preliminary injunction was issued against petitioners;

(d) Because enforcement of said preliminary mandatory injunction or condition would restore and preserve the status quo which existed before respondents made service changes pursuant to their General Orders 119 and 120 and before the strike which made this litigation necessary; and

(e) Because said preliminary mandatory injunction or condition constitutes an adjudication of the merits of this controversy on respondents' application for a preliminary injunction.

SUMMARY OF ARGUMENT

There is no error in the opinion and judgment of the Court of Appeals.

The strike was properly enjoined, by preliminary injunction against petitioners, to protect the jurisdiction of the National Railroad Adjustment Board to decide the merits of petitioners' claims of agreement violations, which claims respondents have submitted to that Board.

The strike was properly enjoined, by preliminary injunction against petitioners, to protect any jurisdiction of the National Mediation Board to which respondents have submitted some of petitioners' claims of agreement violations, subject to jurisdictional objections.

The strike was properly enjoined, by preliminary injunction against petitioners, to protect any jurisdiction of

Committees (established by some of the agreements which petitioners claim have been violated) to which Committees respondents have submitted some of petitioners' claims of agreement violations, subject to jurisdictional objections.

The preliminary injunction against petitioners was not prohibited by the Norris-LaGuardia Act.

The preliminary mandatory injunction against respondents or the condition attached to the preliminary injunction against petitioners was an unlawful invasion by the District Court of the jurisdiction of the National Railroad Adjustment Board.

This Court has already denied to any court the power to invade the jurisdiction of the National Railroad Adjustment Board, which denial of power necessarily extends to all judgments and conditions attached thereto, and it is not necessary, therefore, for this Court again to declare the law.

The petition for a writ of certiorari is predicated upon assumed agreement violations by respondents, which questions will be decided by the National Railroad Adjustment Board on respondents' submission now pending before that Board.

Respondents have not violated any agreements with petitioners.

Respondents have not violated any provision of the Railway Labor Act.

The District Court lacked jurisdiction and power, by its order entered as of January 5, 1959, to convert its preliminary mandatory injunction against respondents, from which respondents appealed on December 29, 1958, into a condition attached to its preliminary injunction against petitioners.

Assuming that the District Court had jurisdiction and possessed discretion to issue said preliminary mandatory injunction against respondents or to attach such condition to said preliminary injunction against petitioners, which respondents deny, the issuance of such preliminary mandatory injunction or the attaching of said condition was an abuse of discretion by the District Court and such preliminary mandatory injunction against respondents or condition attached to said preliminary injunction against petitioners was void and unenforceable for each and all of the following reasons:

(a) Because there are no pleadings or evidence to support said preliminary mandatory injunction or condition;

(b) Because the District Court did not require security from petitioners as required by Rule 65(c) of the Federal Rules of Civil Procedure;

(c) Because enforcement of said preliminary mandatory injunction or condition would destroy the status quo at the time the preliminary injunction was issued against petitioners;

(d) Because enforcement of said preliminary mandatory injunction or condition would restore and preserve the status quo which existed before respondents made service changes pursuant to their General Orders

119 and 120 and before the strike which made this litigation necessary; and

(e) Because said preliminary mandatory injunction or condition constitutes an adjudication of the merits of this controversy on respondents' application for a preliminary injunction.

ARGUMENT

Respondents' argument will be developed under points as hereinafter set forth.

Point 1

The preliminary injunction against petitioners was properly issued.

Authorities

Brotherhood of Railroad Trainmen, et al. v. Chicago River & Indiana Railroad Company, et al., 353 U. S. 30, 1 L. Ed. 2d 622, 77 S. Ct. 635, rehearing denied, 353 U. S. 948, 1 L. Ed. 2d 857, 77 S. Ct. 823.

This is a suit to enjoin a strike which actually became effective, without warning, at 6:00 o'clock A. M. on November 6, 1958. This strike paralyzed all train operations of respondents over 2919 miles of track extending from St. Louis and Kansas City to Oklahoma City, Houston, and San Antonio; it completely paralyzed all yard operations of respondents and all of their switching service to industries at and between those points; it stopped the rail transportation by respondents of United States mail; it

stopped the transportation by respondents of passengers and freight in interstate commerce and in intrastate commerce; it stopped switching service by respondents to more than 3600 industries which are served exclusively by them; it stopped switching service by respondents to more than 1300 industries which are served by respondents and other railroads; it stopped switching service by respondents to hundreds of team tracks and freight stations serving thousands of industries; and it stopped the interchange of cars between respondents and many other railroad companies at hundreds of interchange points (R. 74-75, 90, 16, 18-20) (Affidavit of A. F. Winkel, and Map Exhibit No. 1, Vol. 1, pages 74-75, 90; Verified Complaint, Vol. 1, pages 16, 18-20).

This strike was stopped by a temporary restraining order followed by a preliminary injunction (R. 23-28, 82, 102-103) (Vol. 1, pages 23-28, 82, 102-103).

If this strike is resumed, the above described operations of respondents will again be stopped; respondents will be compelled to close more than 500 stations now serving cities, towns and communities in the States of Missouri, Kansas, Oklahoma, and Texas; respondents will be prevented from transporting more than 900 cars and 37,000 tons of freight daily; respondents will be compelled to lay off approximately 2100 employees, with average daily earnings totaling $33,600.00, in addition to approximately 1100 employees out on strike; and respondents will be immediately deprived of revenues in excess of $160,000.00 per day which will jeopardize the ability of

respondents to meet their mortgage and equipment obligations approximating $10,000.00 per day (R. 75, 18-20) (Affidavit of A. F. Winkel, Vol. 1, page 75; Verified Complaint, Vol. 1, pages 18-20).

In contrast, 10 employees of respondents were affected by the operating changes which preceded the strike (R. 79) (Vol. 3, page 79).

Approximately 83% of the gross revenues of respondents are derived from the transportation of United States mail, express, passengers and freight in interstate commerce to, from, and between the States of Missouri, Kansas, Oklahoma, and Texas, and between those States and practically every other State in the United States, and a resumption of this strike would prevent respondents from transporting such interstate commerce, as well as intrastate commerce within the States of Missouri, Kansas, Oklahoma and Texas (R. 76, 20) (Affidavit of A. F. Winkel, Vol. 1, page 76; Verified Complaint, Vol. 1, page 20).

Petitioners claim that this strike was called because respondents violated certain agreements with petitioners when respondents made certain changes in their assigned way freight service and in their away-from-home terminals for unassigned through freight service between Wichita Falls, Texas, and Forgan, Oklahoma. Prior to the hearing on respondents' application for a preliminary injunction,

these claims of petitioners were submitted by respondents to the First Division of the National Railroad Adjustment Board and, subject to jurisdictional objections, in part to the National Mediation Board[5] and Committees established by some of the agreements which petitioners claim have been violated by respondents (R. 76-78, 84-85, 86-89, 166-427) (Vol. 1, pages 76-78, 84-85, 86-89; Vol. 2, pages 1-262).

This was the situation which confronted the District Court on December 18, 1958, the date of the hearing on respondents' application for a preliminary injunction (R. 41, 102) (Vol. 1, pages 41, 102). Clearly it was his duty to issue, and he did issue, a preliminary injunction enjoining this strike (R. 103) (Vol. 1, page 103). This action was authorized, and in fact required, by the decision of this Court in *Brotherhood of Railroad Trainmen, et al. v. Chicago River & Indiana Railroad Company, et al., 353 U. S. 30, 1 L. Ed. 2d 622, 77 S. Ct. 635, rehearing denied, 353 U. S. 948, 1 L. Ed. 2d 857, 77 S. Ct. 823.* In that case, the Court stated that "the ultimate question is whether a railway labor organization can resort to a strike over matters

[5]In two letters dated January 30, 1959, the National Mediation Board advised appellants as follows:

> "Your application was considered by the Board in executive session on January 26, 1959. In view of the fact that the carriers named have submitted this dispute both to the First Division of the National Railroad Adjustment Board and the Disputes Committees created by the articles of the national agreements mentioned above, the Board directed that your application for an interpretation of the national agreements in question be declined on the basis of the carriers having taken this dispute to the tribunals of appropriate jurisdiction created by Section 3 of the Railway Labor Act and the appropriate sections of the national agreements just mentioned."

Copies of these letters are attached as Appendix D and Appendix E to this brief.

pending before the Adjustment Board" *(U. S. page 31, L. Ed. page 624)*; and, after discussing the nature and purpose of that Board, and holding its awards to be "final and binding upon the parties", the Court upheld the power of the Federal Courts to enjoin a union "from striking to defeat the jurisdiction of the Adjustment Board" *(U. S. pages 39, 42; L. Ed. pages 628, 630)*.

Point 2

The preliminary mandatory injunction against respondents or the condition attached to the preliminary injunction against petitioners was an unlawful invasion by the District Court of the exclusive primary jurisdiction of the National Railroad Adjustment Board.

Authorities

Brotherhood of Railroad Trainmen, et al. v. Chicago River & Indiana Railroad Company, et al., 353 U. S. 30, 1 L. Ed. 2d 622, 77 S. Ct. 635, rehearing denied, 353 U. S. 948, 1 L. Ed. 2d 857, 77 S. Ct. 823;

Central Kentucky Natural Gas Company v. Railroad Commission of Kentucky, et al., 290 U. S. 264, 78 L. Ed. 307;

Magniac, et al. v. Thomson, 56 U. S. (15 Howard) 281, 14 L. Ed. 696;

Order of Railway Conductors v. Pitney, 326 U. S. 561, 90 L. Ed. 318, 66 S. Ct. 322;

Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 94 L. Ed. 795, 70 S. Ct. 577.

The District Court, by order dated December 18, 1958, granted respondents' application for a preliminary injunction and enjoined a strike by respondents' engineers, firemen, conductors, brakemen, and switchmen, pending decision by the National Railroad Adjustment Board, on submission by respondents, as to whether respondents violated any agreements with petitioners when respondents on October 19, 1958, made certain changes in their assigned way freight service and in their away-from-home terminals for unassigned through freight service between Wichita Falls, Texas, and Forgan, Oklahoma (R. 102-103, 76-78, 166-219) (Vol. 1, pages 102-103, 76-78, 84-86; Vol. 2, pages 1-54).

The preliminary injunction was issued primarily to protect the jurisdiction of the National Railroad Adjustment Board as authorized by the decision of this Court in *Brotherhood of Railroad Trainmen, et al. v. Chicago River & Indiana Railroad Company, et al., 353 U. S. 30, 1 L. Ed. 2d 622, 77 S. Ct. 635, rehearing denied, 353 U. S. 948, 1 L. Ed. 2d 857, 77 S. Ct. 823.* In that case, the Court stated that "the ultimate question is whether a railway labor organization can resort to a strike over matters pending before the Adjustment Board" *(U. S. page 31, L. Ed. page 624)*, and, after discussing the nature and purpose of that Board, and holding its awards to be "final and binding upon the parties", the Court upheld the power of the Fed-

eral Courts to enjoin a union "from striking to defeat the jurisdiction of the Adjustment Board" *(U. S. pages 39, 42; L. Ed. pages 628, 630).*[*]

This prohibition, against a strike to defeat the jurisdiction of the National Railroad Adjustment Board, is further evidence of this Court's determination to give that Board "the first opportunity to pass on the issue" *(326 U. S. 567, 90 L. Ed. 323)* and to prevent the invasion by any court of "the jurisdiction conferred on the Adjustment Board by the Railway Labor Act" *(330 U. S. 244, 94 L. Ed. 800)*. This policy of the law has been firmly established by decisions of this Court. In *Order of Railway Conductors v. Pitney, 326 U. S. 561, 90 L. Ed. 318, 66 S. Ct. 322*, a union sought relief in the courts. Recognizing the difficulties inherent in railway labor disputes, and denying injunctive power of courts with respect to the merits of such disputes until the Adjustment Board acts, this Court said:

> "The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue. Certainly the extraordinary relief of an injunction should be withheld,

[*]The reasoning of this case applies with equal force to any jurisdiction of the National Mediation Board, and any jurisdiction of the Committees to which some of petitioners' claims have been submitted, which the preliminary injunction was also designed to protect (R. 102-103, 84-85, 87-89, 220-427) (Vol. 1, pages 102-103, 84-85, 87-89; Vol. 2, pages 55-262).

Respondents' submissions to said Board and Committees were made subject to jurisdictional objections (R. 220, 233-234, 242, 255-256, 264, 280-281, 297, 307-308, 311, 321-322, 325, 335-336, 339, 349-350, 353, 369-372, 381, 404-409) (Vol. 2, pages 55, 68-69, 77, 90-91, 99, 115-116, 132, 142-143, 146, 156-157, 160, 170-171, 174, 184-185, 188, 204-207, 216, 239-244).

at least, until then. (Citing cases.) Only after the Adjustment Board acts, but not until then, can it plainly appear that such relief is necessary to insure compliance with the statute. Until such time, O. R. C. can not show irreparable loss and inadequacy of the legal remedy. The court of equity should, therefore, in the exercise of its discretion stay its hand" *(U. S. page 567, L. Ed. page 323).*

This decision was reaffirmed in *Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 94 L. Ed. 795, 70 S. Ct. 577,* wherein this Court said:

"In this case the dispute concerned interpretation of an existing bargaining agreement. Its settlement would have prospective as well as retrospective importance to both the railroad and its employees, since the interpretation accepted would govern future relations of those parties. This type of grievance has long been considered a potent cause of friction leading to strikes. It was to prevent such friction that the (May 20,) 1926 Act provided for creation of various Adjustment Boards by voluntary agreements between carriers and workers. 44 Stat. 577, 578, ch. 347. But this voluntary machinery proved unsatisfactory, and in 1934 Congress, with the support of both unions and railroads, passed an amendment which directly created a National Adjustment Board composed of representatives of railroads and unions. 48 Stat. 1189-1193, ch. 691. The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree

of uniformity in the interpretation of agreements throughout the nation's railway systems.

"The paramount importance of having these chosen representatives of railroads and unions adjust grievances and disputes was emphasized by our opinion in Order of R. Conductors v. Pitney, 326 U. S. 561, 90 L. Ed. 318, 66 S. Ct. 322, supra. There we held, in a case remarkably similar to the one before us now, that the federal District Court in its equitable discretion should have refused 'to adjudicate a jurisdictional dispute involving the railroad and two employee accredited bargaining agents * * *.' Our ground for this holding was that the court 'should not have interpreted the contracts' but should have left this question for determination by the Adjustment Board, a congressionally designated agency peculiarly competent in this field. 326 U. S. at 567, 568. This reasoning equally supports a denial of power in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act" *(U. S., pages 242-244, L. Ed., pages 799-800).*

Contrary to these decisions, the District Court did not give the National Railroad Adjustment Board "the first opportunity to pass on the issue" and it unlawfully invaded the jurisdiction of the National Railroad Adjustment Board to which respondents have submitted petitioners' claims of agreement violations (R. 102-103, 76-78, 84-86, 166-219) (Vol. 1, pages 102-103, 76-78, 84-86; Vol. 2, pages 1-54). Although enjoining a strike pending decision by the National Railroad Adjustment Board[7] as to whether respond-

[7]Also, pending decisions of the National Mediation Board, and Committees to which some of petitioners' claims have been submitted, subject to jurisdictional objections (R. 102-103, 84-85, 87-89, 220, 233-234, 242, 255-256, 264, 280-281, 297, 307-308, 311, 321-322, 325, 335-336, 339, 349-350 353, 369-372, 381, 404-409) (Vol. 1, pages 102-103, 84-85, 87-89; Vol. 2, pages 55, 68-69, 77, 90-91, 99, 115-116, 132, 142-143, 146, 156-157, 160, 170-171, 174, 184-185, 188, 204-207, 216, 239-244).

ents violated any agreements with petitioners, the District Court, by the same order, issued a preliminary mandatory injunction against respondents or attached a condition to its preliminary injunction against petitioners commanding respondents, pending such decision by the National Railroad Adjustment Board, either to restore such way freight service or pay to employees adversely affected by such changes in way freight service the same amount of money which such employees would have earned had such changes in way freight service not been made (R. 102-103) (Vol. 1, pages 102-103). The jurisdiction of the National Railroad Adjustment Board to determine whether respondents will be in violation of any agreement with petitioners pending decision by that Board and what amount of money, if any, should be paid by respondents to their employees pending decision by that Board, was thus unlawfully invaded and effectively destroyed.[8]

Such prohibited invasion cannot be justified "under the guise of discretionary equity powers to impose reasonable conditions upon the grant of an injunction" (Opinion of Court of Appeals, R. 624, Appendix A, page 11, *266 F. 2d 335, 341)*. The opinion of this Court in *Central Kentucky Natural Gas Company v. Railroad Commission of Ken-*

[8]Likewise, any jurisdiction of the National Mediation Board and Committees to which some of petitioners' claims have also been submitted, subject to jurisdictional objections, was thus unlawfully invaded.

tucky, et al., 290 U. S. 264, 78 L. Ed. 307,[9] is analogous. In that case, the Court recognizing there are "some limitations upon the extent to which a federal court of equity may properly go in prescribing such conditional relief" *(U. S. page 271, L. Ed. page 313)*, reversed the decision of a three-judge District Court which refused to enjoin a confiscatory 45-cent rate because the Gas Company would not comply with the condition prescribed by the Court that the Gas Company "file with the court its consent that the fund impounded from the rate collected in excess of 50 cents per thousand (found to be reasonable) be distributed to such of its patrons as were entitled to share in it" *(U. S. pages 266, 268-269, L. Ed. pages 310, 311)*. In that case, judicial power to prescribe the rate had not been conferred by the Constitution *(U. S. pages 271-272, L. Ed. page 313)*. In this case, judicial power to prescribe the condition does not exist because it is an unlawful invasion of the exclusive primary jurisdiction of the National Railroad Adjustment Board, *Order of Railway Conductors v. Pitney, 326 U. S. 561, 90 L. Ed. 318, 66 S. Ct. 322; Slocum v. Delaware, L.*

[9]Cited in Inland Steel Company v. United States, 306 U. S. 153, 83 L. Ed. 557, 59 S. Ct. 415, upon which petitioners rely (Petition, page 22). In that case, an attack was made upon a report and order of the Interstate Commerce Commission relating to allowances for the spotting of cars. The interlocutory injunction temporarily stayed enforcement of the report and order but, as stated in the opinion:

> "* * * the interlocutory injunction also provided 'that until the further order of the Court, any and all sums due and payable to plaintiff [appellant], under the * * * tariff providing said allowance, shall be set up by defendant Indiana Harbor Belt Railroad Company on its books of account, which sums so set up shall be paid over to * * * [appellant], or canceled, only upon the further order of this Court, [appellant] * * * by its counsel having agreed in open court to such arrangement, without prejudice'." (U. S. page 155; L. Ed. pages 559-560.)

That case is not in point because counsel agreed to imposition of the condition and the case did not involve a jurisdictional question.

& W. R. Co., 339 U. S. 239, 94 L. Ed. 795, 70 S. Ct. 577. Those cases define and establish the rights of the parties which a court of equity "has no power to change or unsettle", and it is the duty of those courts, in such cases, to "follow the law", *Magniac, et al. v. Thomson, 56 U. S. (15 Howard) 281, 299, 14 L. Ed. 696, 703-704.*

Point 3

The dispute is "minor" and within the jurisdiction of the National Railroad Adjustment Board.

Authorities

Brotherhood of Railroad Trainmen, et al. v. Chicago River & Indiana Railroad Company, et al., 353 U. S. 30, 1 L. Ed. 2d 622, 77 S. Ct. 635, rehearing denied, 353 U. S. 948, 1 L. Ed. 2d 857, 77 S. Ct. 823;

Norfolk and Portsmouth Belt Line Railroad Company v. Brotherhood of Railroad Trainmen, et al., 248 F. 2d 34, certiorari denied, 355 U. S. 914, 2 L. Ed. 2d 274, 78 S. Ct. 343;

Order of Railway Conductors v. Pitney, 326 U. S. 561, 90 L. Ed. 318, 66 S. Ct. 322;

Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 90 L. Ed. 795, 70 S. Ct. 577.

All of petitioners' claimed violations are based upon existing agreements, the application and interpretation of which, in the first instance, will be determined by the National Railroad Adjustment Board. This includes the national agreements, the applicability of which is dependent,

in part, upon the correct interpretation of schedule agreements, as shown by the decision of the National Committee (commonly called "Disputes Committee"), created by Article 4 of the agreement of May 23, 1952, with The Brotherhood of Locomotive Engineers in "Case BLE-12-W", wherein that Committee[10] said:

> "If prior to the May 23, 1952 Agreement road switchers could be assigned by bulletin to operate into and out of Los Angeles under existing schedule rules, agreements or practices, the answer to the 'Question at Issue'[11] is 'No.' If not, Article 4 is controlling." (R. 212.) (Exhibit 14, Vol. 2, page 47.)

Only the National Railroad Adjustment Board could determine, in the first instance, whether the Santa Fe violated its schedule agreement with The Brotherhood of Locomotive Engineers in making such assignment. *Order of Railway Conductors v. Pitney, 326 U. S. 561, 90 L. Ed. 318, 66 S. Ct. 322; Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 90 L. Ed. 795, 70 S. Ct. 577.*

The *Norfolk* case[12] is in point. The Court of Appeals said:

> "The issue framed, negotiated and mediated by the parties here was a minor dispute, which, upon failure of the parties to agree, was referable to the National

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[10]Composed of three carrier members and R. E. Davidson, First Assistant Grand Chief Engineer of The Brotherhood of Locomotive Engineers; S. C. Phillips, Assistant President of The Brotherhood of Locomotive Firemen and Enginemen; and J. A. Paddock, President of The Order of Railway Conductors and Brakemen.

[11]Whether The Atchison, Topeka and Santa Fe Railway Company violated Article 4 of the May 23, 1952, agreement with The Brotherhood of Locomotive Engineers "when it changed the on and off duty point of certain road switcher assignments from Los Angeles, California, to Rivera, California".

[12]Norfolk and Portsmouth Belt Line Railroad Company v. Brotherhood of Railroad Trainmen, et al., 248 F. 2d 34, certiorari denied, 355 U. S. 914, 2 L. Ed. 2d 274, 78 S. Ct. 343.

Railroad Adjustment Board for final determination. The Brotherhoods clearly stated their position * * * that, under the existing agreements, the carrier could not establish Berkley Yard as a point for reporting and relief of any of its crews except with the consent of the Brotherhoods. They were standing upon the legal position that, in the absence of a new agreement requiring their assent, the establishment of a point for reporting and relief at Berkley Yard would constitute a violation by the carrier of §2, Seventh, and §6 of the Act (45 U.S.C.A. §152, Seventh, §156) * * * With equal clarity, the carrier * * * asserted its position that its proposed action was within its managerial prerogative as established in the existing agreements, which it had the unconditional and unilateral right to exercise. The existing agreements, according to the stated position of the Brotherhoods, prohibited the action, while, in the carrier's view, they authorized it." (Pages 40-41.)

* * * * *

"The controversy thus was centered upon the nature of the decision. The difference was whether, under the existing agreements, it was within the exclusive power of management, acting unilaterally, to make and effectuate the change or whether effectuation of the change might be conditioned by the Brotherhoods upon negotiation and other procedures looking toward a new or supplemental agreement. Since it thus arose out of a difference of opinion as to the interpretation or application of the existing agreements, it was a 'minor dispute' subject to final determination by the National Railroad Adjustment Board."[13] (Pages 42-43.)

To the same effect was the holding in the instant case. The Court of Appeals said in part:

"In the present case, collective agreements were in effect between the Railroad Companies and each of

[13]The Court added: "Evidently for that reason, the Mediation Board refused to docket the case upon the application of the Brotherhoods, * * *." (page 43.) The Board, in the instant case, also refused to docket the dispute (R. 82) (Vol. 1, page 82).

the Brotherhoods. The Brotherhoods claim that those agreements provide for notice and negotiation concerning establishment of or changes in district runs or numbers of crews assigned to them, with resolution of differences by Committees or officials designated in the collective agreements, and with the right of either party to invoke the services of the National Mediation Board. Upon the theory that the changes effected by Orders 119 and 120 amount to changes in *agreements* affecting rates of pay, rules or working conditions, the Brotherhoods claim that the Railroad Companies have violated Section 6 of the Railway Labor Act, 45 U.S.C.A. §156, by not following the procedure therein prescribed. The Railroad Companies claim that the existing agreements relate to establishment of service, not to changes or rearrangement of service long established, and that they have retained their powers of management to change terminals and rearrange runs when business or changed conditions justify.

"Without intimating any view as to their validity, we think it clear that the respective *contentions* of the Railroad Companies and of the employees are based upon existing agreements; their *claims* are to rights accrued and not to have new rights created for the future. The dispute is thus a 'minor' dispute, the resolution of which is committed to the National Railroad Adjustment Board" (R. 624) (Appendix A, pages 9-10, *266 F. 2d 335, 340).*

The dispute being "minor", it is clearly within the jurisdiction of the National Railroad Adjustment Board. ***Brotherhood of Railroad Trainmen, et al. v. Chicago River & Indiana Railroad Company, et al., 353 U. S. 30, 1 L. Ed. 2d 622, 77 S. Ct. 635, rehearing denied, 353 U. S. 948, 1 L. Ed. 2d 857, 77 S. Ct. 823.***

Point 4

Respondents have not violated any agreement with petitioners or any provision of the Railway Labor Act.

Authorities

Awards 12907, 15636, 16032, and 16188 of the First Division of the National Railroad Adjustment Board;

Benson Hotel Corporation v. Woods, 168 F. 2d 694;

Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Company, 353 U. S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622;

Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U. S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886;

Manion v. Kansas City Terminal Railway Company, 353 U. S. 927, 77 S. Ct. 706, 1 L. Ed. 2d 722;

Mansfield Hardwood Lumber Company v. Johnson, 242 F. 2d 45;

New York Central Railroad Company v. Brotherhood of Railroad Trainmen, et al., 140 F. Supp. 273, affirmed 246 F. 2d 114, certiorari denied, 355 U. S. 877, 2 L. Ed. 2d 107, 78 S. Ct. 140;

Norfolk and Portsmouth Belt Line Railroad Company v. Brotherhood of Railroad Trainmen, et al., 248 F. 2d 34, certiorari denied, 355 U. S. 914, 2 L. Ed. 2d 274, 78 S. Ct. 343;

Order of Railway Conductors v. Pitney, 326 U. S. 561, 90 L. Ed. 318, 66 S. Ct. 322;

Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 94 L. Ed. 795, 70 S. Ct. 577;

Virginian Railway Company v. System Federation No. 40, et al., 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 592.

Railway Labor Act:

Section 2 Seventh (45 U. S. C. A. Section 152 Seventh);

Section 6 (45 U. S. C. A. Section 156).

Twenty-third Annual Report of the National Mediation Board to Congress (June 30, 1957).

The nature of the petition compels respondents to discuss the merits of the basic controversy although the appeals below were from preliminary injunctions, *Mansfield Hardwood Lumber Company v. Johnson, 242 F. 2d 45, 46; Benson Hotel Corporation v. Woods, 168 F. 2d 694, 696,* and courts are not concerned with the merits of these controversies, *Norfolk and Portsmouth Belt Line Railroad Company v. Brotherhood of Railroad Trainmen, et al., 248 F. 2d 34, 43, certiorari denied, 355 U. S. 914, 2 L. Ed. 2d 274, 78 S. Ct. 343.*

Public Interest

In the forefront of this argument, we deem it advisable to emphasize the public interest in this controversy, particu-

larly in view of the dire consequences visited upon the public, as well as respondents and their innocent employees, by the strike which actually occurred and which would be visited by a renewal of the strike if the preliminary injunction against petitioners is vacated. The public interest in these controversies was thus cogently stated by this Court in *Virginian Railway Company v. System Federation No. 40, et al., 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 592:*

> "More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern" *(U. S. page 552, L. Ed. page 802).*

And, because of the public interest, in cases of this character "strikes, or other forms of self-help, are neither contemplated nor permissible",[14] *Norfolk and Portsmouth Belt Line Railroad Company v. Brotherhood of Railroad Trainmen, et al., 248 F. 2d 34, 40, certiorari denied, 355 U. S. 914, 2 L. Ed. 2d 274, 78 S. Ct. 343.*

Responsibilities and Rights of Management

We also wish to emphasize the fact that managing officers of a railroad corporation have a responsibility both to their company and to the public, and they must have the rights which are necessary to discharge such responsibility.

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[14]Citing Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U. S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886; Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Company, 353 U. S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622; Manion v. Kansas City Terminal Railway Company, 353 U. S. 927, 77 S. Ct. 706, 1 L. Ed. 2d 722.

This was aptly stated by the District Court in *New York Central Railroad Company v. Brotherhood of Railroad Trainmen, et al., 140 F. Supp. 273, affirmed 246 F. 2d 114, certiorari denied, 355 U. S. 877, 2 L. Ed. 2d 107, 78 S. Ct. 140.* After stating that the proposed closing of a yard "is a decision for management alone to make if, in the interest of efficiency of operation, service to the public or meeting competition, management should deem such step advisable", the District Court said:

> "We can envision any number of situations wherein management would decree a physical change in its method of operations either in its offices, its terminals, on its roadbeds, in its round houses, or in the operation of its trains, wherein the work of certain of its employees would be affected, and see no reason why management should be precluded from making these decisions in the interest of their company as well as of the public. Such decisions have been and are being made by public carriers as a matter of right and without consultation with their employees. To decree otherwise would bring about a violent disruption to our free enterprise system" (pages 279-280).

Rearrangement of Service

The lines of railroad involved in this litigation are shown in red on the map, marked "Exhibit 1", attached to and made a part of the affidavit of A. F. Winkel (R. 90) (Vol. 1, page 90). The portion thereof between Wichita Falls, Texas (North Yard), and Forgan, Oklahoma, over which this controversy arose, is emphasized by paralleling green lines. This line, 302 miles in length, is the Western Subdivision of the Southern Division of respondents' lines of railroad (R. 76) (Vol. 1, page 76).

This 302-mile line now constitutes and always has constituted a separate seniority district for said respondents' engineers, firemen, conductors and brakemen, and each of such employees holding seniority on such district now has and always has had the right to exercise such seniority anywhere on such district and to perform any needed service over all or any part of said district to which he is or was entitled by virtue of such seniority.

Prior to October 19, 1958, way freight crews on this line were assigned as follows:

> Two crews between North Yard (Wichita Falls, Texas) and Welon (Altus, Oklahoma), a distance of 75.9 miles, daily except Sunday, with North Yard the home terminal for both crews, and with Sunday layover at North Yard for one crew and at Welon for the other crew;
>
> One crew from Welon (Altus, Oklahoma) to Elk City, Oklahoma, and return, a distance of 58.3 miles in each direction, daily except Saturday, with Welon the home terminal and with Saturday layover at Welon;
>
> One crew from Elk City, Oklahoma, to Guest (Woodward, Oklahoma), a distance of 84.8 miles, on Mondays, Wednesdays and Fridays, and from Guest to Elk City on Tuesdays, Thursdays and Saturdays, with Elk City the home terminal and with Sunday layover at Elk City; and
>
> One crew from Guest (Woodward, Oklahoma) to Forgan, Oklahoma, a distance of 83.2 miles, on Mondays, Wednesdays and Fridays, and from Forgan to Guest on Tuesdays, Thursdays and Saturdays, with Guest the home terminal and with Sunday layover at Guest.

Such way freight assignments, or similar way freight assignments between North Yard (Wichita Falls, Texas) and Forgan, Oklahoma, have been in existence for more than twenty-five years (R. 76-77) (Vol. 1, pages 76-77).

Effective at 12:01 A. M. on October 19, 1958, respondents rearranged assigned way freight service between North Yard (Wichita Falls, Texas) and Forgan, Oklahoma, as follows:

> Assigned two way freight crews to operate between North Yard (Wichita Falls, Texas) and Elk City, Oklahoma, a distance of 134.2 miles, daily except Sunday, with North Yard the home terminal of both crews, and with Sunday layover at North Yard for one crew and at Elk City for the other; and
>
> Assigned one way freight crew to operate from Elk City, Oklahoma to Forgan, Oklahom, a distance of 168 miles, on Mondays, Wednesdays and Fridays, and from Forgan to Elk City on Tuesdays, Thursdays and Saturdays, with Elk City the home terminal and with Sunday layover at Elk City.

This rearrangement of way freight service was made in accordance with General Order No. 119 of respondents dated October 2, 1958, a copy of which, marked "Exhibit 2", is attached to and made a part of the affidavit of A. F. Winkel (R. 91) (Vol. 1, page 91).

Prior to October 19, 1958, North Yard (Wichita Falls, Texas) was the home terminal and Altus, Oklahoma, Woodward, Oklahoma, and Forgan, Oklahoma, were the bulletined away-from-home terminals for unassigned crews in through freight service between North Yard (Wichita Falls, Texas) and Forgan, Oklahoma. Effective at 12:01

A. M. on October 19, 1958, respondents abolished Altus, Oklahoma, and Woodward, Oklahoma, as away-from-home terminals for unassigned crews in through freight service, established Elk City, Oklahoma, as an away-from-home terminal for such crews, leaving North Yard (Wichita Falls, Texas) as the home terminal and Forgan, Oklahoma, as an away-from-home terminal for such crews. This change in away-from-home terminals was made in accordance with General Order No. 120 of respondents dated October 2, 1958, a copy of which, marked "Exhibit 3", is attached to and made a part of the affidavit of A. F. Winkel (R. 77-78, 92) (Vol. 1, pages 77-78, 92).

North Yard (Wichita Falls, Texas) now is and always has been the home terminal for unassigned crews in through freight service between North Yard and Forgan, Oklahoma, and North Yard (Wichita Falls, Texas) now is and always has been the only point where an extra board has been maintained for way freight crews and unassigned through freight crews operating between North Yard (Wichita Falls, Texas) and Forgan, Oklahoma (R. 78) (Vol. 1, page 78).

Assigned way freight crews now handle, and they always have handled, all of the traffic between North Yard (Wichita Falls, Texas) and Forgan, Oklahoma, except, during the grain seasons in May and June of each year, unassigned crews in through freight service are called as needed to handle the overflow wheat which cannot be handled by way freight crews, and, when so called, un-

assigned through freight crews operate over all or any portion of the line without changing crews except in rare instances where an available crew is used out of an away-from-home terminal under the first-in first-out rule (R. 78) (Vol. 1, page 78).

This line has been recently dieselized. Prior thereto all traffic was handled by steam locomotives which were capable of only short runs, making it necessary to have more terminals. This resulted in considerable terminal delays to through traffic because the requirements of local service made it impossible to arrange through connecting schedules. These delays resulted in the loss of traffic, principally through diversion to trucks. To overcome such losses, it was necessary to expedite the movement of traffic by extending runs and reducing the number of terminals, thereby eliminating all unnecessary terminal delays. This was made possible through the use of diesel power. These were the changes made effective on October 19, 1958 (R. 78) (Vol. 1, page 78).

Agreement Provisions

There is no provision in any agreement between respondents and petitioners, or any of them, which prohibited respondents from rearranging their service, as above described, between Wichita Falls, Texas, and Forgan, Oklahoma. In the absence of such prohibition, respondents had the right to make such changes. This has been made abundantly clear by many awards of the First Division of

the National Railroad Adjustment Board. We quote from a few of them:

Award 15636, Docket 24703 (July 28, 1952)
First Division, with Referee Edward F. Carter

"It is elemental that the efficient and safe operation of a railroad is the prerogative of management except to the extent that it has been limited by law and the contracts which it has made." (R. 120.) (Award, page 7; Bound Volume 108, page 413.)

Award 16032, Docket 25436 (January 27, 1953)
First Division
Engineers-Firemen Supplemental Board with
Referee Alfred A. Colby

"The Board does not function in a vacuum. We are well aware that enlightened railroad labor organizations recognize the principle that the schedule agreements do not deny to the carrier the right to manage and operate its properties economically and efficiently and that the carrier is also under legal obligation to do so. The carrier's fundamental management rights are restricted only to the extent that they are limited or surrendered in the schedule agreements." (R. 120.) (Award, page 19; Bound Volume 112, page 33.)

Award 16188, Docket 27267 (March 19, 1953)
First Division
Engineers-Firemen Supplemental Board with
Referee Charles Loring

"These claimants base their claims upon the contention that the carrier had no right to cancel established assignments and bulletin new assignments. No contract or rule has been cited to us to sustain such a claim. The carriers have the prerogative to arrange their train assignments to conform to the demands of traffic. Even when an assignment was originally established as the result of a conference the rule is the same; nor is there any rule as to how long new assign-

ments shall remain in effect. There could not well be such a rule if the carriers were to stay in business." (R. 120.) (Award, page 7; Bound Volume 113, page 622.)

Award 12907, Docket 21786 (August 2, 1949)
First Division, with Referee John W. Yeager

"In the absence of a prohibitory rule it appears proper for a Carrier in order to meet changed conditions to rearrange runs and make assignments accordingly and to pay for the service on the rearranged basis according to the time and mileage of the run." (R. 121.) (Award, page 6; Bound Volume 86, page 443.)

Schedule Agreements

In addition to their inherent right, respondents had authority to make such changes under the following provisions of agreements between respondents and petitioners:

Agreement with
The Brotherhood of Locomotive Engineers
(Effective October 1, 1918)

"Article 34"

"The rights to regular engines, also the right and preference to regular runs will be governed by seniority in service on the respective districts to which engineers may be assigned.

"No freight run or yard engine of less than six days per week will be considered for regular assignment and engineers on all such assignments will be paid for all work days not used. *Five days' notice will be given before* road service of this kind is inaugurated or *terminal is changed.* It is understood that fixture switch engineers hold seniority only in yard service." (Agreement, page 29.) (Our italics.) (R. 78-79.) (Vol. 1, pages 78-79.)

"Article 35"

"Should service be reduced, preference of runs will be governed by seniority on the respective district; when any run is created or vacant on district, the senior engineer on such district will have the right to such run. Should he decline to accept it, or fail to ask for it within ten days, after such vacancy occurs, he will forfeit his right to such run until it again becomes vacant, and it will be open to each engineer who is younger in service in accordance with above provisions.

"*A run will be vacant when terminal is changed to the extent of two miles or more* or when vacated by the engineer holding it, or when the regular time or mileage is changed as much as four hours." (Agreement, page 30.) (Our italics.) (R. 79) (Vol. 1, page 79.)

"Article 11"

"Held Away-From-Home Terminal"
(As amended by National Agreement dated August 11, 1948—page 15)

"(a) Engineers in pool freight and in unassigned service held at other than home terminal will be paid continuous time for all time so held after the expiration of sixteen hours from the time relieved from previous duty, at the regular rate per hour paid them for the last service performed. If held sixteen hours after the expiration of the first twenty-four hour period, they will be paid continuous time for the time so held during the next succeeding eight hours, or until the end of the second twenty-four hour period, and similarly for each twenty-four hour period thereafter.

"(b) Should an engineer be called for service or ordered to deadhead after pay begins, the held-away-from-home terminal time shall cease at the time pay begins for such service or, when deadheading, at the

time the train leaves the terminal, except that in no event shall there be duplication of payment for deadhead time and held-away-from-home terminal time.

"(c) Payments accruing under this rule shall be paid for separate and apart from pay for the subsequent service or deadheading.

"(d) For the purpose of applying this rule, the *railroad will designate a home terminal* for each crew in pool freight and in unassigned service." (Our italics.) (R. 79.) (Vol. 1, page 79.)

Agreement with
The Brotherhood of Locomotive Firemen and Enginemen

(Effective October 1, 1918, with revisions to November 1, 1957)

"Article 40"

"(a) When any run is created or vacant on a district, the senior fireman on such District will have the right to such run. Should he fail to make application or bid for such run within five days after such vacancy is posted, except in the case of sickness or absence, he will forfeit his right to such run until it again becomes vacant, and it will be opened to each fireman who is younger in service in accordance with the above provisions, provided, that when a fireman exercises the privilege of taking a run created or made vacant during his sickness or absence, the run will not otherwise be reopened.

"(b) *A run will be considered vacant when terminal is changed to the extent of two or more miles*, or when vacated by the fireman holding it, or when the time or mileage is changed to the extent of 10 per cent, or when the lay over is changed as much as four hours. This last provision not to apply to yard engines." (Agreement, page 40.) (Our italics.) (R. 79-80.) (Vol. 1, pages 79-80.)

"Article 11"

"Held Away-From-Home Terminal"

"(a) (National Agreement, August 11, 1948.) Firemen, and helpers on other than steam power, in pool freight and in unassigned service held at other than home terminal will be paid continuous time for all time so held after the expiration of sixteen hours from the time relieved from previous duty, at the regular rate per hour paid them for the last service performed. If held sixteen hours after the expiration of the first twenty-four hour period, they will be paid continuous time for the time so held during the next succeeding eight hours, or until the end of the second twenty-four hour period, and similarly for each twenty-four hour period thereafter.

"(b) Should firemen, or helper on other than steam power, be called for service or ordered to deadhead after pay begins, the held-away-from-home terminal time shall cease at the time pay begins for such service or, when deadheading, at the time the train leaves the terminal except that in no event shall there be duplication of payment for deadhead time and held-away-from-home terminal time.

"(c) Payments accruing under this rule shall be paid for separate and apart from pay for the subsequent service or deadheading.

"(d) For the purpose of applying this rule, *the railroad will designate a home terminal* for each crew in pool freight and in unassigned service." (Agreement, page 17.) (Our italics.) (R. 80.) (Vol. 1, page 80.)

Agreement with
The Brotherhood of Railroad Trainmen and The Order of Railway Conductors and Brakemen

(Effective November 1, 1929, with revisions to April 1, 1954)

"Article 10"

"Wayfreight and Mixed Train Service"

"Rates of pay effective December 16, 1953"

* * * * *

"(f) No changes will be made in the above runs (between Wichita Falls and Forgan), nor number of crews assigned to them, unless business or changed conditions justify it, nor will terminals be changed, or runs rearranged, without ten (10) days' notice * * *." (Agreement, page 15.) (R. 80.) (Vol. 1, page 80.)

"Article 45"

* * * * *

"(e) Seniority will govern the preference of assignment in service, provided that senior trainmen declining closed runs will forfeit their rights to same until vacancies occur, except in reducing the force, the youngest man will be reduced from the service.

* * * * *

"(g) Trainmen holding closed runs who are displaced by their seniors or whose runs have been abolished, will have the right within ten (10) days to displace any junior man.

* * * * *

"(i) The following shall be known as closed runs: *Wayfreight and mixed runs*, assigned work trains, pilots assigned to helper engines, also passenger runs that are located away from division terminals, regular runs on the G. H. & H. and any other runs located away from a district terminal, *and shall be advertised for a period of ten (10) days.*" (Agreement, page 39.) (Our italics.) (R. 80-81.) (Vol. 1, pages 80-81.)

* * * * *

Freight Service Rulings

(Appendix to Agreements with The Brotherhood of Railroad Trainmen and The Order of Railway Conductors and Brakemen.)

* * * * *

"(h) When closed runs are thrown open for advertisement due to changed conditions, etc., the regular conductor and brakeman holding such run at that time will be permitted to hold run during advertisement.

"(i) It is agreed that when a terminal is changed for a closed run or a run changed from day to night, such run will be advertised." (R. 80.) (Vol. 1, page 80.)

"Article 34"

"Conductors and Trainmen in pool freight and in unassigned service held at other than home terminal will be paid on the minute basis for the actual time so held after the expiration of sixteen hours from the time relieved from previous duty at a rate per hour of 1/8th of the daily rate paid them for the last service performed. If held sixteen hours after the expiration of the first twenty-four hour period from the time relieved, they will be paid for the actual time so held during the next succeeding eight hours, or until the end of the second twenty-four hour period, and similarly for each twenty-four hour period thereafter.

"Should a Conductor or Trainman be called for service or ordered to deadhead after pay begins, held away from home terminal time shall cease at the time pay begins for such service or deadheading.

"Payments accruing under this rule shall be paid for separate and apart from pay for the subsequent service for deadheading.

"For the purpose of applying this rule *the railroad will* designate a home terminal for each crew in pool

freight and in unassigned service." (Agreement, page 30.) (Our italics.) (R. 81.) (Vol. 1, page 81.)

The foregoing agreement rules and freight service rulings authorize the abolishment or rearrangement of runs when, in the judgment of management, this is made necessary or desirable for business reasons, or because of changed conditions, and such rules and rulings authorize changes in terminals deemed necessary or desirable by management as a result of the abolishment or rearrangment of such runs.

There is no merit in petitioners' claim that respondents, in making such changes, violated provisions of their schedule agreements.[18]

Petitioners now assert that respondents violated Article 10 (a) and (f) and Article 59 of their schedule agreement with The Brotherhood of Railroad Trainmen and The Order of Railway Conductors and Brakemen (Petition, pages 9-10, 24). No contention is now made, as in petitioners' answer, that respondents violated all of Article 10 and Articles 11 and 60 of that schedule agreement (R. 42-43) (Vol. 1, pages 42-43). Petitioners, therefore, have waived their claimed violation of Article 10 (b), (c), (d), (e), and (g), and Articles 11 and 60 of said schedule agreement. There has been no violation of Article 10 (a) which merely prescribes the *rates* of pay of conductors and brakemen.

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[18]The power to resolve this issue lies within the exclusive primary jurisdiction of the First Division of the National Railroad Adjustment Board to which it has been submitted by respondents. Order of Railway Conductors v. Pitney, 326 U. S. 561, 90 L. Ed. 318, 66 S. Ct. 322; Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 94 L. Ed. 795, 70 S. Ct. 577 (R. 69, 166-167) (Vol. 1, page 69; Vol. 2, pages 1-2).

There has been no violation of Article 10 (f) because "business or changed conditions" justified the changes in the runs (R. 78) (Affidavit of A. F. Winkel, Vol. 1, page 78) and respondents gave the required 10 days' notice of terminal changes and rearrangement of runs (R. 76-78, 91-92) (Affidavit of A. F. Winkel, and Exhibits 2 and 3, Vol. 1, pages 76-78, 91-92). There has been no violation of Article 59 because respondents have not made any "ruling" with respect to Article 10.

Mediation Agreements

Petitioners assert that respondents violated mediation agreements with petitioners (Petition, page 10).[16] The

[16]Respondents have submitted this issue to the First Division of the National Railroad Adjustment Board (R. 69, 166, 167) (Vol. 1, page 69; Vol. 2, pages 1, 2), and, subject to jurisdictional objections, to the Disputes Committees created by the respective Mediation Agreements (R. 70-71, 297, 298, 311, 312, 325, 326, 339, 340) (Vol. 1, pages 70-71; Vol. 2, pages 132, 133, 146, 147, 160, 161, 174, 175), and, subject to jurisdictional objections, to the National Mediation Board (R. 58-59, 353-354) (Vol. 1, pages 58-59; Vol. 2, pages 188-189).

The National Mediation Board declined to interpret these Mediation Agreements "on the basis of the carriers having taken this dispute to the tribunals of appropriate jurisdiction created by Section 3 of the Railway Labor Act and the appropriate sections of the national agreements just mentioned" (Appendix D to this brief).

The policy of the National Mediation Board with respect to its interpretation of mediation agreements, is thus stated on page 42 of its Twenty-third Annual Report to Congress for the year ending June 30, 1957:

> "Under section 5, second, of the Railway Labor Act, the National Mediation Board has the duty of interpreting the specific terms of mediation agreements. Requests for such interpretations may be made by either party to mediation agreements, or by both parties jointly. The law provides that interpretations must be made by the Board within 30 days following a hearing, at which both parties may be present and defend their respective positions.
>
> "In making such interpretations, the National Mediation Board can consider only the meaning of the specific terms of the mediation agreement. The Board does not and cannot attempt to interpret the application of the terms of a mediation agreement to particular situations" (R. 497-498) (Vol. 3, pages 69-70).

agreements to which petitioners refer are the provisions of Article VIII (b) of Mediation Agreement Case No. A-5241, dated November 20, 1956, with The Brotherhood of Locomotive Firemen and Enginemen, the provisions of Article VIII (b) of Mediation Agreement Case No. A-5248 dated April 5, 1957, with The Brotherhood of Railroad Trainmen, the provisions of Article V (b) of Mediation Agreement Case No. A-5294 dated June 12, 1957, with The Order of Railway Conductors and Brakemen, and the provisions of Article VIII (b) of Mediation Agreement Case No. A-5464 dated July 18, 1957, with The Brotherhood of Locomotive Engineers. Copies of those articles are attached as Exhibits 16, 17, 18 and 19, respectively, to respondents' submission to the National Railroad Adjustment Board (R. 214-219) (Vol. 2, pages 49-54). The relevant provisions of those articles are substantially the same. They prohibit a carrier from serving any notice or progressing any pending notice (1) to decrease the rate of compensation provided in existing agreements or understandings, or (2) to eliminate agreements providing for any rate of compensation, or (3) to negotiate agreements which would have the effect of decreasing the number of employees required to be used under existing agreements. Respondents have not done any of these things and therefore the provisions of those articles have not been violated.

National Agreements

There is no merit in petitioners' contentions that respondents have violated the provisions of Article 4 of a National Agreement dated May 23, 1952, between The

Brotherhood of Locomotive Engineers and representatives of numerous railroad companies, including respondents, and that respondents have violated the provisions of Article 4 of a National Agreement dated May 23, 1952, between The Brotherhood of Locomotive Firemen and Enginemen and representatives of numerous railroad companies, including respondents[17] (Petition, pages 7-9, 15-16, 23-24, 26).

Petitioners have now receded from their position before the National Mediation Board in October, 1958, that respondents also violated similar agreements with The Order of Railway Conductors and Brakemen (formerly The Order of Railway Conductors) and The Brotherhood of Railroad Trainmen (R. 82) (Vol. 1, page 82), and petitioners have now receded from the allegation in their answer that respondents violated a similar agreement with The Order of Railway Conductors and Brakemen (R. 44) (Vol. 1, page

[17]Respondents have submitted this issue to the First Division of the National Railroad Adjustment Board (R. 69, 166, 167) (Vol. 1, page 69; Vol. 2, pages 1, 2), and, subject to jurisdictional objections, to the National Committees created by the respective agreements (R. 69-70, 220, 242) (Vol. 1, pages 69-70; Vol. 2, pages 55, 77), and, subject to jurisdictional objections, to the National Mediation Board (R. 59, 381) (Vol. 1, page 59; Vol. 2, page 216).

The National Mediation Board has declined to interpret those provisions of the agreements "on the basis of the carriers having taken this dispute to the tribunals of appropriate jurisdiction created by Section 3 of the Railway Labor Act and the appropriate sections of the national agreements just mentioned" (Appendix E to this brief).

It is doubtful that either of these agreements is an "agreement reached through mediation" within the meaning of Section 5 Second of the Railway Labor Act (45 U. S. C. A., Sec. 155 Second) but, if so, the policy of the National Mediation Board with respect to its interpretation of such agreements, as set forth on page 42 of its Twenty-third Annual Report to Congress for the year ending June 30, 1957, is in the record (R. 497-498) (Vol. 3, pages 69-70) and is reproduced in the preceding footnote.

44). Petitioners therefore have waived their previous claims of such additional violations.[18]

A copy of Article 4 of the agreement of May 23, 1952, with The Brotherhood of Locomotive Engineers and a copy of Article 4 of the agreement of May 23, 1952, with The Brotherhood of Locomotive Firemen and Enginemen are attached as Exhibits 10 and 11, respectively, to respondents' submission to the First Division of the National Railroad Adjustment Board (R. 207, 208) (Vol. 2, pages 42, 43). Those articles are identical. The title of each refers, among other things, to intradivisional "service", and the pertinent provisions are:

> "*Where a carrier desires to establish* interdivisional, interseniority district, *intradivisional*, or intraseniority district *runs in* passenger or *freight service*, the carrier shall give notice to the General Chairman of the organizations involved of its desire *to establish* such runs, giving detailed information *specifying the*

[18]Petitioners admitted that there never was such an agreement between respondents and The Brotherhood of Railroad Trainmen (R. 16-17, 43) (Verified Complaint, Vol. 1, pages 16-17; Verified Answer, Vol. 1, page 43).

The provisions of Article 6 (instead of Article 4) of the National Agreement dated May 23, 1952, between The Order of Railway Conductors (now The Order of Railway Conductors and Brakemen) and representatives of numerous railroad companies, including respondents, became an agreement on August 1, 1952, between said Order and respondents but said agreement was cancelled in the year 1954 when said Order and respondents agreed upon a reprint of their agreements and agreed (1) not to reproduce the provisions of Article 6 of said National Agreement of May 23, 1952, (2) that said provisions were rejected, and (3) that existing rules or practices were preserved (R. 17, 12-13, 93-100) (Verified Complaint, Vol. 1, page 17; Affidavit of A. F. Winkel, and Exhibits 4 to 9, inclusive, Vol. 1, pages 12-13, 93-100).

Respondents also submitted petitioners' claim that respondents violated the provisions of Article 6 of said agreement of May 23, 1952, to the First Division of the National Railroad Adjustment Board (R. 69, 166, 167) (Vol. 1, page 69; Vol. 2, pages 1, 2), and, subject to jurisdictional objections, to the National Committee created by said agreement (R. 70, 264) (Vol. 1, page 70; Vol. 2, page 99), and, subject to jurisdictional objections, to the National Mediation Board (R. 59, 381-382) (Vol. 1, page 59; Vol. 2, pages 216-217).

service it proposes to establish and the conditions, if any, which it proposes shall govern *the establishment of such service*, the purpose being to furnish the employees with all the necessary information.

"The parties will negotiate in good faith on *such proposals* and failing to agree, either party may invoke the services of the National Mediation Board. If mediation fails and the parties do not agree to arbitrate the dispute under the Railway Labor Act, then at the request of either party, the proposal will be considered by a National Committee consisting of the chiefs of the employee organizations involved and an equal number of carrier representatives who shall be members of the Carriers' Conference Committees, signatories hereto, or their successors or representatives * * *.

"If said National Committee does not agree upon the disposition of *the proposal*, then the conferees will in good faith undertake to agree upon a neutral chairman who will sit with the Committee, hear the arguments of the parties, and make representations and recommendations to the parties with the view in mind of disposing of the controversy. In the event the parties do not agree upon such neutral chairman, then upon the request of the parties, or either of them, the National Mediation Board will appoint the chairman.

"While the recommendations of the Chairman are not to be compulsory or binding as an arbitration award, yet the parties hereto affirm their good intentions of arranging through the above procedures for the final disposition of all such disputes on a fair and reasonable basis" (Our italics) (R. 207-208) (Vol. 2, pages 42-43).

These agreements, effective August 1, 1952, relate to intradivisional *service* which "a carrier desires to *establish*"—not, as here, to a change or rearrangement of such service which has been in existence for more than 25 years

(R. 76-77) (Affidavit of A. F. Winkel, Vol. 1, pages 76-77.[19]

Furthermore, these agreements do not relate to intradivisional service established under other agreements either before or after August 1, 1952, the effective date of Articles 4, or to intradivisional service which could have been established under other agreements either before or after that date. This has been made clear by decisions of the National Committees (commonly called "Disputes Committees") created by said agreements of May 23, 1952, three of which are attached as Exhibits 12, 13, and 14, to respondents' submission to the National Railroad Adjustment Board (R. 209-212) (Vol. 2, pages 44-47).

In "Case BLE-12-W" (R. 212) (Exhibit 14, Vol. 2, page 47), involving The Brotherhood of Locomotive Engineers, the Disputes Committee[20] said:

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[19]These national agreements also are not applicable because:

(1) This 302 miles of line between Wichita Falls, Texas, and Forgan, Oklahoma, now is and always has been a separate seniority district for engineers, firemen, conductors and brakemen with the extra board maintained at Wichita Falls, and each of such employees holding seniority on such district now has and always has had the right to exercise such seniority anywhere on such district and to perform any needed service over all or any part of said district to which he is or was entitled by virtue of such seniority; and

(2) Respondents have and have had the right, under other working agreements in effect on August 1, 1952, and now in effect, to establish, abolish, and change any terminal on said line and to establish, lengthen, shorten, abolish, and change, any run or runs on said line, and such agreements and rights were not affected by said national agreements.

[20]Composed of three carrier members and R. E. Davidson, First Assistant Grand Chief Engineer of The Brotherhood of Locomotive Engineers; S. C. Phillips, Assistant President of The Brotherhood of Locomotive Firemen and Enginemen; and J. A. Paddock, President of The Order of Railway Conductors and Brakemen.

> "If prior to the May 23, 1952 Agreement road switchers could be assigned by bulletin to operate into and out of Los Angeles under existing schedule rules, agreements or practices, the answer to the 'Question at Issue'[21] is 'No'. If not, Article 4 is controlling."

Only the National Railroad Adjustment Board could determine, in the first instance, whether the Santa Fe violated its schedule agreement with The Brotherhood of Locomotive Engineers in making such assignment. *Order of Railway Conductors v. Pitney, 326 U. S. 561, 90 L. Ed. 318, 66 S. Ct. 322; Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 94 L. Ed. 795, 70 S. Ct. 577.*

No importance should be attached to petitioners' repeated assertions that respondents *established* intradivisional *runs* in violation of national agreements (Petition, pages 7-9, 15-16, 23-24, 26). They are well aware that only a *change* in *existing service* was made. In requesting the services of the National Mediation Board in October, 1958, petitioners then declared that respondents were violating these national agreements by "*changing* intradivisional *service*". The Board accepted this statement and, after investigation by one of its mediators, held that "the dispute is not one subject to docketing and mediation under the Act" (R. 82) (Affidavit of A. F. Winkel, Vol. 1, page 82).[22]

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[21] Whether The Atchison, Topeka and Santa Fe Railway Company violated Article 4 of the May 23, 1952, agreement with The Brotherhood of Locomotive Engineers "when it changed the on and off duty point of certain road switcher assignments from Los Angeles, California, to Rivera, California".

[22] Petitioners also claim that respondents violated these national agreements by "abolishing established terminals" (Petition, page 16) (R. 82) (Vol. 1, page 82). Clearly there is no substance to this contention because these national agreements do not apply to terminals.

Alleged Statutory Violations

Status Quo

There is no merit in petitioners' contention that respondents violated Section 6 of the Railway Labor Act (45 U. S. C. A. Sec. 156) in not maintaing the status quo while this controversy was pending before the National Mediation Board in October, 1958 (Petition, pages 10-11, 14-15, 17, 19-22).

Section 6 of the Railway Labor Act (45 U. S. C. A. Sec. 156) reads as follows:

> "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by Section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

Section 6 has no application to this case because, as stated by the National Mediation Board in a prior proceeding, involving a part of this line, Section 6 applies "only in

situations where notices of changes are served by either party on the other in rates, rules or working conditions as covered by agreements" (R. 83) (Vol. 1, page 83); or, in the language of that section, "written notice of an intended change *in agreements* affecting rates of pay, rules, or working conditions". (Our italics.) This is not such a case.

Furthermore, the National Mediation Board did not request respondents, before the changes were made, to maintain the status quo.[23] The changes were made on October 19, 1958 (R. 77-78) (Vol. 1, pages 77-78). On October 20, 1958, the Executive Secretary of the National Mediation Board advised respondents that a mediator would commence an investigation on October 21, 1958, and that the Board "suggests carrier defer contemplated changes pending such immediate investigation" (R. 82) (Vol. 1, page 82). The Board never requested respondents to restore the status quo.

Section 2 Seventh and Section 6 of the Railway Labor Act

There is no merit in petitioners' contention that respondents changed rates of pay, rules, or working conditions in violation of Section 2 Seventh and Section 6 of the Railway Labor Act. (Petition, pages 14-15, 17, 21-22, 25-26).

Section 2 Seventh of the Railway Labor Act (45 U. S. C. A. Section 152 Seventh) reads as follows:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its em-

[23]As the Board did on two previous occasions when its requests were observed by respondents (R. 83) (Vol. 1, page 83).

> ployees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

Section 6 of the Railway Labor Act (45 U. S. C. A. Section 156) has been quoted in the preceding section of this brief.

There has been no violation of either section because, as stated by the National Mediation Board in a prior proceeding involving a part of this line:

> "Section 2 Seventh and Section 6 of RLA (Railway Labor Act) apply only in situations where notices of changes are served by either party on the other in rates, rules or working conditions as covered by agreements" (R. 83) (Vol. 1, page 83);

or, as stated in the language of Section 6, "written notice of an intended change *in agreements* affecting rates of pay, rules, or working conditions" (our italics); because respondents have not served any such notice; and because respondents have not made any change in any agreement affecting rates of pay, rules, or working conditions.

Initiation of Section 6 Notice

There is no merit in petitioners' contention implicit throughout their petition, that respondents should have initiated a Section 6 notice. There was no reason why they should do so. Furthermore, in a strikingly similar case, *Norfolk and Portsmouth Belt Line Railroad Company v. Brotherhood of Railroad Trainmen, et al., 248 F. 2d 34*,[24] it was held that this burden was upon the organizations. The Court of Appeals said:

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[24]Certiorari denied, 355 U. S. 914, 2 L. Ed. 2d 274, 78 S. Ct. 343.

"* * * In their answer in this case, the Brotherhoods alleged that the change to Berkley Yard as the point for reporting and relief of some of the crews 'does constitute a change in working conditions within the meaning of Section 2, Article 7, of the Railway Labor Act requiring the complainant to give the defendants notice of such change pursuant to Section 6 of the Railway Labor Act, and requiring negotiations by complainant and defendants to establish working conditions applicable to such change'." (Page 43.)

* * * * *

"* * * The Brotherhoods did not comply with Section 6." (Page 45.)

* * * * *

"* * * The concession of the Brotherhoods to the legal position of the carrier upon the 'minor issue' may have made moot the pending proceeding before the Adjustment Board, but it cannot leave them free to strike in aid of proposed contract changes when they have not fully processed any such proposal as a 'major dispute' under the required procedures of the Act." (Page 46.)

As in the *Norfolk* case, petitioners have not initiated a Section 6 notice in the instant case.

Point 5

The Norris-LaGuardia Act has no application to this case.

Authorities

Brotherhood of Railroad Trainmen, et al. v. Chicago River & Indiana Railroad Company, et al., 353 U. S. 30, 1 L. Ed. 2d 622, 77 S. Ct. 635, rehearing denied, 353 U. S. 948, 1 L. Ed. 2d 857, 77 S. Ct. 823;

APPENDIX

United States District Court
SOUTHERN DISTRICT OF NEW YORK

BALTIMORE & OHIO RAILROAD COMPANY., *et al.*,
Plaintiffs,

v.

UNITED RAILROAD WORKERS DIVISION OF THE TRANSPORT WORKERS UNION OF AMERICA, CIO, IN ITS OWN RIGHT AND AS REPRESENTATIVE OF UNITED RAILROAD WORKERS OF AMERICA, CIO, LOCAL 1463 THEREOF AND THEIR MEMBERS, *et al.*,
Defendants.

BRYAN, D. J. (orally): Gentlemen, in view of the exigencies of this situation and the consequent damage to the public interest in having this situation continuing, I have written an opinion here which I think disposes of the issues before me. I may say that the opinion I am delivering as an oral opinion because it has been written under very considerable pressure, as you can imagine, and in the midst of handling a very large number of other motions, so that it may be subject, as I re-read it, to some correction and revision of a purely minor nature, and it is not necessarily the final product, except in terms of all conclusions reached.

[*Nature of Case*]

The plaintiff railroads are common carriers engaged in interstate commerce and coming into and serving the City

and Port of New York. The defendants are alleged to be unions and officers of unions, representing railroad employees in various crafts working on the fleets of tugboats operated by the respective railroads in and about New York Harbor.

In action No. 147-119, plaintiffs sue for an injunction to restrain what is alleged to be an unlawful strike or work stoppage threatened against them on their harbor tugs in violation of the Railway Labor Act, 45 U. S. C., Section 151, *et seq.*, and for damages sustained as a result thereof.

This labor dispute stems from action taken by the plaintiff railroads on June 10, 1959, when they posted notices advising that all positions as firemen, oiler or oiler-firemen on the tugs using diesel power would be abolished as of five days later at 12:01 a. m. on June 15, 1959. No other prior notice of this contemplated action had been given by the railroads either to unions or employees.

Defendant Local 1463 of the Transport Workers Union thereupon advised the plaintiff railroads that it had authorized a strike of tugboat and bridge forces to be called on June 15, 1959, at 12:01 a.m., when the abolition of these positions became effective, and that it was actively soliciting the support of other unions also to strike against the plaintiffs.

The plaintiff railroads thereupon commenced the present action and secured from this Court an order to show cause why a temporary injunction against such strike or work stoppage should not be granted. The order contained a

provision restraining a strike or work stoppage or the aiding, abetting or encouragement of such action pending the hearing and determination of the motion.

Upon the return day of the railroads' motion for a preliminary injunction, the defendant unions brought on by order to show cause cross-motions for an order directing the railroads to restore the firemen-oilers who had been fired to their positions pending determination under the procedures authorized by the Railway Labor Act of the labor dispute which they claimed existed by reason of this controversy.

Prior to the hearing of this motion, and on June 15, 1959, the railroads, pursuant to their notice, had fired at least 125 oilers employed upon their diesel tugboats. The oilers so laid off began picketing piers and other places where tugboats were tied up. As a result, employees in other crafts refused to cross the picket lines and all railroad traffic in the harbor by water ceased to move.

There was considerable controversy upon the argument of these motions as to whether the unions had withdrawn all strike authorizations and had instructed their members to work, or whether they were at least encouraging or aiding the work stoppage in violation of the temporary restraining order. However, this question is not now before me and I am concerned at this time only with whether a temporary injunction should be issued as the railroads ask and whether the railroads should be directed to restore the oilers to their positions pending appropriate action under the Rail-

way Labor Act as the unions request. These are the only issues posed by the present motion and cross-motions.

[*Submission to Railway Adjustment Board*]

Prior to the argument of the motion, the railroads made an *ex parte* submission to the Railway Adjustment Board of what they apparently claimed to be the nub of the dispute. Their submission claims that "there are no restrictions under the existing agreements which prohibit the carriers from abolishing the position" of oiler on their diesel tugs. The submission proceeds upon the theory that since the applicable collective bargaining agreements do not on their face prohibit or restrict the abolition of these jobs, the carriers have the common law right to abolish these positions in the exercise of their managerial prerogatives.

The railroads' submission attempts to sustain the burden of showing that the oilers' positions are in fact unnecessary and recites facts which it is claimed sustain that burden.

It is apparent from reading the submission that it is the railroads' position that the question of whether or not the positions are unnecessary is one for determination by the Railway Adjustment Board, as is the question of whether or not they have the right to abolish these positions as a matter of managerial prerogative under the terms of the collective bargaining agreement, and under the provisions of the Railway Labor Act. These are some of the very questions which the railroads seek to have this Court determine upon their application for a preliminary injunction.

The submission, moreover, cites many cases in which the Adjustment Boards have considered and determined similar or analogous claims as part of normal procedure under the Railway Labor Act.

On June 15, the day before these motions were returnable, the National Mediation Board requested representatives of the parties to meet with it "for discussion and investigation of the issues involved in this dispute." I understand that some such discussions have been had but that they have been suspended pending the determination of the motions by this Court.

Am I correct in that, Mr. Allen?

Mr. Allen: They have been suspended, sir. I think your Honor is 100 per cent correct.

The Court: I think I am sufficiently correct. If there is any slight inaccuracy here, we can correct it.

[*Statement of Case*]

The plaintiffs here maintain tugboats, lighters, carfloats, ferries, piers and docks in and about New York Harbor and in the Hudson and East Rivers. These marine operations are an important link in plaintiffs' transportation services both by way of interchange and otherwise. They handle through these marine facilities approximately 49 million tons of freight per year from which is derived an annual gross revenue of approximately 118 million dollars. The float service operated by tugs handles an average of 1,547 cars of freight daily. This freight consists in large

part of food, fuel, medicines and other commodities. Disruption of this service is causing hardship to the public as well as serious harm to the plaintiffs.

There are collective bargaining agreements now in force and effect between the various railroads and the various union defendants covering the classes of employees which the unions represent. These classes of employees include the firemen-oilers both on diesel and steam tugs, among the other marine crafts. It is unnecessary to go into the terms of the individual collective bargaining agreements since for purposes of this action it is stipulated that they are all of substantially the same pattern. These collective bargaining agreements are in the usual form and establish rates of pay, hours, rules and working conditions for the employees covered thereby.

While the facts before me are by no means complete, such essential facts as are necessary for the disposition of these motions are for all practical purposes agreed to or admitted. Neither side has asked for a hearing on the facts. The questions for decision arise under the admittedly applicable provisions of the Railway Labor Act, 46 U. S. C., Section 151, *et seq.*

The railroads have made a transition from steam to diesel tugs over a number of years. On steam tugs there had always been at least two men in the engineroom, the engineer and a fireman, whose principal job was to stoke the fires. The practice of having two men in the engineroom continued as diesel tugs were substituted for the older steam tugs, and the second man on the diesel was denomi-

nated as an oiler or oiler fireman. On the diesel tugs stoking was no longer necessary, and the railroads claim that the oiler is for all practical purposes a supernumerary. At the present time the majority of the tugs operated by the railroads are diesel powered and the position of the second man in the engineroom filled by the oilers has been maintained on diesel tugs for many years. All diesel tugs now operated were in operation at the time of the execution of the last collective bargaining agreements between the railroads and the unions covering tugboat workers and among the crafts specifically listed in the agreements which are now in force, and have been in force for several years, are oilers and firemen on tugboats.

Plaintiff railroads assert that the change from steam to diesel power has made the position of oiler on the diesel tugs wholly unnecessary. They claim that whereas the firemen on steam tugs perform a necessary function, the only job performed by the oilers on the diesel tugs now consists of keeping the engineroom brass and bilges clean. This is the basis, it is claimed, for the abolition of these positions.

[*Railroad's Contentions*]

The railroads contend that as a management prerogative they have the right in their uncontrolled discretion to abolish unnecessary jobs in the absence of express contractual provisions to the contrary. They claim that since the collective bargaining agreements with the unions contain no express prohibition against the abolition of the oilers' jobs they have the absolute right to abolish them, and that this

is no concern of the union and does not give rise to a labor dispute within the meaning of the Railway Labor Act.

They assert that the oilers whose jobs are abolished may, and no doubt have, seniority rights which may enable them to bid in on the relatively few steam tug jobs which remain and also are entitled to rights under the Railway Retirement Act. They say that the only labor dispute which may arise out of the abolition of these jobs is that relating to the enforcement of the seniority and other rights which the fired or otherwise displaced employees enjoy and cannot relate in any way to the abolition of their positions by management prerogative.

[*Unions' Contentions*]

The unions, on the other hand, maintain that the oilers' jobs are protected by the collective bargaining agreements, that the abolition of their positions on the diesel tugs is a lockout by the railroads and is a unilateral modification of the outstanding collective bargaining contracts by the railroads, and that the railroads have not followed the mandatory processes required by the Railway Labor Act for modifying or changing the contractual arrangements presently in effect. They point to the fact that the diesel tugs were being operated at the time the present collective bargaining agreements were negotiated, that the diesel oilers are specifically covered in such agreements as to rates of pay, hours and working conditions, and that the agreements expressly forbid the discontinuance or abolition of existing positions and the creation of other positions under other

titles to do the same type of work. The unions claim that the oilers still do useful work on the diesel tugs and that the abolition of their positions would of necessity result in the transfer of their duties and functions to new or different positions in substantial modification of the existing agreements.

[*Issues*]

The questions presented for decision here are whether, pending the completion of the procedures prescribed by the Railway Labor Act, (1) the railroads are entitled to a preliminary injunction restraining the strike or work stoppage by the unions and (2) the unions are entitled to a decree directing the plaintiffs to restore the status quo by returning the oilers who have been laid off to their positions. The determination of these questions depends on the interpretation and application of the Railway Labor Act which I have recently had occasion to consider extensively in *American Airlines v. Air Line Pilots Association*, 169 Fed. Supp. 777 [36 Labor Cases ¶65,151]. It is unnecessary to repeat the analysis of the various provisions of the Act which I made there.

However, a brief discussion of the mechanics of the Act as it is applied in the settlement of labor disputes will be helpful.

[*Minor or Major Dispute*]

Such disputes are either minor or major. This terminology is not used in the Act but arises from the definitions contained in Section 3, First, (i), Section 2, Sixth and

Seventh, and Section 6. Thus, what are termed "minor" disputes arise out of the interpretation or application of existing collective bargaining agreements and grievances arising therefrom. A major dispute, on the other hand, is one that arises from an intended "change in agreements affecting rates of pay, rules or working conditions." See *Elgin J. & E. R. R. Co. v. Burley*, 325 U. S. 711 [9 Labor Cases ¶51,212].

This distinction is of major importance here where the railroads assert that whatever dispute presently exists is minor and the unions insist that it is major. Its importance lies in the different legal consequences which flow from the two different kinds of disputes.

Both must be first negotiated between the parties.[1] If such negotiations are unsuccessful the process for the settlement of major and minor disputes diverges widely. A minor dispute may be referred by either or both parties to the Railway Adjustment Board or to the appropriate system Adjustment Board designated by the collective bargaining agreement. The Adjustment Board determines the dispute and its decision is final. In the case of a minor dispute a strike during the pendency of the matter before the Adjustment Board is illegal and may be enjoined. There is no right to strike or to use any economic self-help or pressure even after the award has been made and the

[1]It may be noted at this point that the railroads do not allege that they made any attempt whatsoever to negotiate with the unions or even to discuss the proposed abolition before they published the five-day notices of abolition. The unions maintain, and it is not challenged, that they were not even notified of the proposed abolition before the notices were published. The railroads, on the other hand imply that they would have been willing to discuss the matter with the unions had not the unions immediately issued strike calls.

parties are bound to comply with it. *Brotherhood of Trainmen v. Chicago River & Indiana R. R. Co.*, 353 U. S. 30 [32 Labor Cases ¶70,566].

If, on the other hand, the dispute is major a different procedure is followed after the preliminary negotiations have failed. There is no compulsion on the parties to agree at any stage of the procedure. However, duties are specifically imposed on both carrier and union to attempt the settlement of major disputes by mediation under the aegis of the National Mediation Board. Mediation failing, the Board may recommend arbitration. If the parties accept arbitration they are bound by the award of the arbitrators. If they refuse to accept arbitration a Presidential Emergency Board may be convoked under appropriate circumstances which makes a report and recommendations on the dispute.

There are three "freeze" or "cooling-off" periods covering the entire course of the proceedings required to be followed under the Act, and the parties are required to maintain the status quo with respect to the matters in controversy until thirty days after the processes of the Act have been exhausted.

While the parties are free to resort to the recognized types of economic coercion or pressure after the exhaustion of the processes of the Act, neither strike nor lockout nor any other change in the status quo may be resorted to until such exhaustion has taken place, and any such action may be restrained by injunction. *American Airlines v. Air Line Pilots Association, supra*, and cases there cited.

[*Labor Emergency Provision*]

Moreover, a further mechanism is provided by the Act to aid in the settlement of any dispute whether it be major or minor. If a dispute reaches such proportions that in the view of the National Mediation Board a "labor emergency" exists, the Board may proffer its services under Section 5, First, (b) of the Act. In this situation the Board in its discretion may treat the controversy as a major dispute and mediate on that basis. If this occurs the various "freeze" provisions of the Act applicable in the case of major disputes come into play and neither of the parties may change the status quo "in effect prior to the time when the dispute arose."

It also seems plain that the Mediation Board may attempt to resolve the dispute even if in its view it is minor. If such efforts to resolve a minor dispute fail the Mediation Board may remit the parties to the appropriate Adjustment Board for determination. See *Brotherhood of Trainmen v. Chicago River & Indiana R. R. Co.*, 353 U. S. 30 [32 Labor Cases ¶70,566].

The policy of the Act is to avoid economic strife and disruption in the vital transportation industry. In some areas of strife (where the disputes are minor) the parties are precluded from waging private economic warfare to the detriment of the public. These disputes are referred to final and binding compulsory arbitration. The freedom of either party to resort to economic self-help is subordinated to the public interest in maintaining a functioning and

uninterrupted transportation system. *Elgin J. & E. R. R. Co. v. Burley, supra,* pages 725-728.

In major disputes involving issues which are of vital importance to the parties, while the Act does not proscribe the use of ultimate economic coercion, the public interest is protected until the procedures of the Railway Labor Act have been fully exhausted. The "freeze" provisions which the Act contains serve both as a "cooling-off" period and as a period in which public opinion can be crystallized as a means of pressure upon the parties to reach agreement without strike or lockout and the consequent disruption of commerce.

At least in the case of major disputes it is plain that it is the purpose of the Act to maintain the status quo ante throughout.

The present controversy is plainly one which falls within the statutory scheme of the Railway Labor Act and is to be determined pursuant to its provisions. What is the posture of this controversy in terms of the Railway Labor Act procedures?

[*Railroad's Treatment of Controversy as Major Dispute*]

The railroads, proceeding on the premises that this is a minor dispute, have made their ex parte submission to the Railway Adjustment Board. Implicit in this submission is the concession that even the question of whether they have the right to abolish these positions in the exercise of uncontrolled managerial prerogative is a matter for determination by that Board.

The basis of the railroads' contention that this is a minor dispute is not entirely clear. As far as I am able to ascertain, their position may be summarized as follows:

There is no express prohibition in the collective bargaining agreements against abolition of the oilers' positions or, indeed, against abolition of the oilers' positions, or indeed, against the abolition of any positions deemed by the management to be unnecessary. Such abolition is matter of management prerogative which lies in the uncontrolled discretion of the railroads. Therefore, the matter is one in which the unions have no voice and does not constitute a labor dispute at all. Since the unions maintain that the oiler positions are protected by the collective bargaining agreement, the only dispute there can be concerns the interpretation and application of these existing contracts and is therefore a minor dispute only.

[*Unions' Treatment of Controversy as Minor Dispute*]

The unions, on the other hand, maintain that the abolition of these positions which are expressly covered as to wages, hours and working conditions by the collective bargaining agreements, constitutes an attempted unilateral change or modification of the agreements which cannot be accomplished without following the procedures, including notice of intended change provided by Section 6 of the Act. The dispute is therefore necessarily a major one. Moreover, the unions contend that if the oilers do any work at all (and it is claimed that they do considerable) the abolition of their positions will necessarily mean the reassign-

ment of such work to other crafts or classes of employees, which is forbidden by the collective bargaining agreement and necessarily involves a change in the terms of such agreements within the meaning of Section 6. See *O'Donnel, et al. v. Pan American World Airways, Inc.*, Second Circuit, 200 Fed. 2d 929 [22 Labor Cases ¶67,327]; *Butte, A. & P. R. R. Co. v. Brotherhood of Locomotive Firemen and Enginemen*, D. C. D. Montana, 168 Fed. Supp. 911 [37 Labor Cases ¶65,284], affirmed Ninth Circuit, No. 16,372, May 18, 1959 [37 Labor Cases ¶ 65,485]. (It may be noted that one of the unions asserts that it represents oilers only and that the action of the railroads totally abolishes the class of employees which it represents.)

It may be noted, however, that at this point the National Mediation Board is making its own investigation. No doubt, in the course of that investigation and discussions had with the parties, attempts will be made to adjust the controversy.

If those attempts fail the Mediation Board may either withdraw from the matter or determine that a labor emergency exists and thus invoke the processes of the Act applicable to major disputes. If the Board withdraws then the Adjustment Board must act on the submission of the railroads and any counter-submissions made by the unions.

[*Jurisdiction*]

Of course, the unions may question the jurisdiction of the Adjustment Board over the disputes submitted by the railroads upon the ground that it is a major rather than a

minor dispute, as the Board may also do on its own motion. The Boards will have to determine their own jurisdiction, and in making that determination decide whether the dispute is major, as the unions claim, or minor as the railroads claim. The Boards clearly have the power to make such a determination. See Garrison, *The National Railroad Adjustment Board*, 46 Yale Law Journal 568.

If the Adjustment Board should take jurisdiction then either (a) it may find in favor of the railroads on the merits and the railroads would be free to abolish the positions, or (b) it may determine the questions submitted against the railroads on the merits, in which event the railroads would, of course, be obligated to retain these persons in their positions, or (c) it may direct the parties to take such other action or impose such conditions as it deems appropriate under the circumstances.

If the Adjustment Board declines jurisdiction on the ground that the dispute is major, then the parties are relegated to their remedies under Section 6 for the settlement of major disputes and are bound to maintain the status quo ante pending the exhaustion of such procedures.

There is no question that the appropriate agencies under the Railway Labor Act have the power to decide which of these contentions, and any related contentions of the parties, are correct. This is true even as to the railroads' claim that there is no labor dispute at all on the theory that abolition may be made as a matter of managerial prerogative. *Norfolk & P. B. L. R. Co. v. Brotherhood of Railroad Trainmen*, Fourth Circuit, 248 Fed. 2d 34 [33 Labor Cases

¶70,944], certiorari denied 355 U. S. 914. Cf. *Brotherhood of Railway & Steamship Clerks v. Railroad Retirement Board*, Eighth Circuit, 239 Fed. 2d 37.

Not only have the Railway Labor Act agencies the power to decide such questions but they are the appropriate agencies to decide them. The Railway Labor Act contemplates that such questions shall in the first instance be decided within its framework rather than by the courts. These agencies have the competence and expertise in this field which qualify them to make such determinations and make it particularly fitting that they should make them.

I do not propose to usurp their functions here and to substitute the courts for the processes of the Railway Labor Act provided for this purpose by the Congress.

Therefore, I will not undertake to decide these questions here but will remit the parties to the processes of the Railway Labor Act for their determination. My only concern at this stage is to vindicate the policies and procedures of the Railway Labor Act and to permit them to be carried out effectively.

[*Preservation of Status Quo*]

One thing is plain, however, at least until it is determined whether this is a major or minor dispute, it is essential as a practical matter that the status quo ante be maintained. Moreover, the maintenance of this status quo ante here is of paramount importance because the disturbance of the status quo by the firing of the oilers is plainly the cause of whatever work stoppage presently exists.

[*Inability to Strike During Act's Application*]

Ordinarily, whether the dispute be major or minor, the unions are precluded from striking while the procedures of the Railway Labor Act are being followed. Here, the unions assert that the railroads are precluded from enjoining the strike by the Norris-LaGuardia Act because they failed to engage in preliminary negotiations with the unions as they were required to do before formal submission to the agencies which the Act provides. It is unnecessary here to determine whether this contention of the unions is correct, or whether, as the railroads claim, the precipitated action of the unions in calling a strike relieved them from the necessity of entering into the negotiations with the unions which they claim they were willing to undertake had a strike call not been issued.

For the basic practical question here is whether, as the unions claim, the railroads should be required to restore these oilers to the positions which have been abolished during the pendency of the Railway Labor Act proceedings. This is the key to the whole question of work stoppage, whether by way of strike, as the railroads claim, or by way of refusal of employees to cross picket lines, as the unions maintain.

[*No Injunction Until Oilers Restored*]

It seems clear to me that the railroads are not entitled to the injunctive relief which they seek unless and until they restore the oilers to these positions. The firing of these oilers, whose positions are covered by the collective bar-

gaining agreement, and many of whom have held these positions without protest by the railroads for many years, in the absence of any precipitating technological change or circumstance, does not seem to me to be in accordance with the theory or spirit of the Railway Labor Act.

This is emphasized by the controversy as to whether this is a major or minor dispute, a question which remains to be determined during the course of the procedures under the Railway Labor Act, which I have outlined above.

Moreover, the claim of the railroads that the exercise of managerial prerogative does not involve a labor dispute, which comes under the Railway Labor Act at all, is belied by its own *ex parte* submission of that very question to the Adjustment Board under the Railway Labor Act.

The policy of the Railway Labor Act for the avoidance of economic warfare in the transportation industry in the public interest, the equities of the present situation, and the necessity of maintaining the status quo ante at least until the question of whether this is a major or minor dispute is administratively determined all impel the conclusion that the railroads should be directed to restore these oilers to their positions at this time. Indeed, until the processes compelled by the Act are followed, any change in the status quo ante violates the express purpose of the Act to "avoid any interruption of commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." (Section 2, First.) See *Howard v. Thompson*, D. C. E. D. Mo., 72 F. Supp. 695, 703 [13 Labor Cases ¶64,081], affirmed in part, reversed on other

grounds, sub nom. *Howard v. St. Louis-San Francisco Railway Co.*, Eighth Circuit, 191 Fed. 2d 442 [20 Labor Cases ¶66,523], affirmed sub nom. *Brotherhood of Railway Trainmen v. Howard*, 343 U. S. 768 [21 Labor Cases ¶67,004].

[*Unions' Motions Granted*]

I will therefore grant the crossmotions of the unions to the extent of directing that the railroads restore the oilers to the positions on the diesel tugs which have been abolished pending the completion of appropriate processes under the Railway Labor Act. Such restoration shall take place not later than midnight of Saturday, June 20, 1959.

[*Strike Enjoined*]

There remains the prayer of the railroads for injunctive relief against strike or work stoppage pending the completion of Railway Labor Act procedures. In all probability the restoration of the oilers to their positions at this time, as I am directing, will eliminate the causes of the current work stoppage and full tugboat service will resume. However, the situation is disturbed at present and service is now interrupted to the great disadvantage of both the public and the railroads. It is essential that the status quo ante be maintained while the Railway Labor Act procedures are being followed.

Under these circumstances a preliminary injunction should issue continuing in force the provisions of the temporary restraining order previously made in this case.

Since the reinstatement of the oilers will restore the status quo ante it is unnecessary to consider further the contention of the unions that the railroads are barred from injunctive relief under the Norris-LaGuardia Act because of their alleged failure to follow procedures required by law. If negotiation is required as a prerequisite to submission to the Adjustment Boards, that is a matter for the Boards to determine in the course of the Railway Labor Act procedures.

These injunctive directions will serve to vindicate the processes of the Railway Labor Act in the manner and harmonize its provisions with those of the Norris-LaGuardia Act approved by the Supreme Court in the *Chicago River* case.

Proposed orders carrying out the decisions made in this opinion will be exchanged by the parties and submitted to me at my chambers at 11:30 a. m., Saturday morning, June 20, 1959.

[*No Injunctive Relief Against Secondary Unions*]

One further matter remains for decision. The railroads have also brought a separate action, No. 147-164, against unions not named as defendants in their original suit which represent the engineers, masters and other marine crafts on the tugboats. This action is to restrain a strike or work stoppage by them alleged to be threatened or actually in effect. A motion for a preliminary injunction similar to that sought in the original action has been made by the railroads. After hearing several of the defendant unions I

declined to issue a temporary restraining order since I was not persuaded that these unions had taken strike action or were aiding or encouraging a work stoppage by their members in any way.

After hearing argument and considering the affidavits submitted in support of and in opposition to the motion, I have concluded that a temporary injunction should not be issued in the second action. The unions named as defendants do not represent any of the oiler-firemen but only other crafts. It has not been established that these unions have authorized the strike, threatened one or encouraged or aided or abetted, or approved, the work stoppage which occurred. Indeed, such evidence as there is is to the contrary.

The railroads concede that the oilers who have been fired have the right to call their plight to the attention of the public by picketing. The unions claim that they cannot compel their individual members to cross such picket lines as the oilers have established, and it is doubtful if they can do so. Moreover, there is some indication that members of the defendant unions have tried to continue work on the tugboats but have been prevented from so doing because the tugs were laid up.

[*Ruling*]

In any event, in view of the determination I have made in the first action any immediate cause of strike has been removed and there seems no reason to suppose that the work stoppage now in effect will continue. Under these circumstances I deny the railroads' request for a prelimi-

nary injunction against the defendant unions in the second action without prejudice to a renewal should later circumstances so dictate.

It is so ordered.

Order

ORDERED that, on or before 12:00 midnight on June 20, 1959, plaintiffs and each of them take such steps as may be necessary to restore to their former positions of employment, with all rights, benefits and disabilities both to the employees and to the railroads as they had under the existing collective bargaining agreements between and among the respective plaintiffs and defendants, all employees who have been discharged or otherwise affected by the labor dispute which is the subject matter of the within action, it being the intended effect of this Order that the status quo ante be restored and maintained in all respects as it existed immediately prior to June 10, 1959, until all procedures and processes under the provisions of the Railway Labor Act for the adjustment and settlement of the labor dispute which is the subject matter of this action have been completed and exhausted, and it is

FURTHER ORDERED that the defendants and each of them and all persons acting in concert with them shall cease and desist from calling, promoting, instigating, abetting, continuing, participating in or approving any strike or work stoppage against the plaintiffs arising from the labor dispute concerning the employment of said oilers, firemen and oiler-firemen on diesel tugs owned, controlled or operated

by said plaintiffs which is the subject matter of this action, and from all acts in furtherance of any such strike or work stoppage or in support thereof, until all procedures and processes under the provisions of the Railway Labor Act for the adjustment and settlement of the labor dispute which is the subject matter of this action have been completed and exhausted, and it is

FURTHER ORDERED that, in connection with the aforesaid labor dispute, the defendants and each of them and all persons acting in concert with them shall refrain from picketing the premises and property of the plaintiffs, including their piers, wharves, vessels and waterfront facilities, including the entrances thereto, from interfering with ingress or egress to or from plaintiffs' property, or from loitering or congregating at or near any approaches thereto or upon any public street or highway leading to and from any place which employees of the plaintiffs or those having business with the plaintiffs desire to enter or leave enroute to or from said premises, until all procedures and processes under the provisions of the Railway Labor Act for the adjustment and settlement of the labor dispute which is the subject matter of this action have been completed and exhausted, and take all steps within their power to prevent any such strike or work stoppage from occurring or continuing if commenced, and it is

FURTHER ORDERED that the plaintiffs shall post security pursuant to Rule 65(c) FRCP in the sum of $10,000 and defendants shall post such security in the sum of $5,000, both in the aggregate by 3 P. M. on June 22, 1959, and it is

FURTHER ORDERED that the opinion of the Court rendered herein shall constitute the findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure.